Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of	)	
	)	
Performance Measurements and Standards for Interstate Special Access Services	)	
	)	CC Docket No. 01-321
Petition of U S West, Inc., for a Declaratory Ruling Preempting State Commission Proceedings to Regulate U S West's Provision for Federally Tarriffed Interstate Services	)	CC Docket No. 00-51
	)	
Petition of Association for Local Telecommunications Services for Declaratory Ruling	)	CC Docket Nos. 98-147, 96-98, 98-141
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	)	CC Docket No. 96-149
	)	
2000 Biennial Regulatory Review - Telecommunications Service Quality Reporting Requirements	)	CC Docket No. 00-229
	)	
AT&T Corp. Petition to Establish Performance Standards, Reporting Requirements, and Self-Executing Remedies Need to Ensure Compliance by ILECs with Their Statutory Obligations Regarding Special Access Services	)	RM 10329

COMMENTS OF WORLDCOM, INC.

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Executive Summary

The single most important step that the Commission can take today to promote robust competition for business customers is to require the largest incumbent local exchange carriers (LECs) to measure and report their performance in provisioning and maintaining special access services. Incumbent LEC-provided special access services are key inputs in the provision of voice and data services to enterprise business customers, particularly those with multiple locations. In the vast majority of cases, WorldCom and its rivals are dependent on incumbent LECs for the provision of the "last mile" special access circuits to the customer premises, because no other carrier has facilities in place.

Incumbent LECs' provisioning of special access services is already unreasonably slow, unpredictable and discriminatory. The New York Public Service Commission investigated special access provisioning in New York and found that Verizon's provisioning performance is unacceptably poor, and that available data suggests that Verizon treats its carrier customers less favorably than its end-user customers.

Because of the interLATA restrictions on the Bell Operating Companies (BOCs), business customers with multiple locations are today served primarily by interexchange carriers. As the BOCs obtain section 271 approval throughout their regions and begin to offer interLATA services to business customers, the BOCs will have a growing incentive to gain an advantage in the business market by discriminating against interexchange carriers in the provision of special access, or by raising the costs of special access services for their competitors. There are no effective safeguards in place today to prevent the incumbent LECs from engaging in such anti-competitive behavior.

The Commission has a great deal of experience in developing safeguards to prevent carriers possessing market power in one market from leveraging that power into a second competitive market. The Commission's legal authority to adopt such competitive safeguards under the core provisions of Title II of the Communications Act, Sections 201 and 202, is well established.

Therefore, the Commission should exercise its broad and longstanding legal authority to adopt performance measures, performance standards, and reporting requirements for the provision of special access services by incumbent LECs to all customers, including carrier customers and end-user customers. In unprecedented fashion, the competitive industry has proposed a single, unified set of performance measurements, standards and reporting requirements. Adoption of these metrics would allow the Commission to eliminate a group of ARMIS reporting requirements, and is intended to enable the Commission to improve special access provisioning significantly without increasing the reporting burden imposed on incumbent LECs.

Performance standards will provide certainty to both incumbent LECs and to their carrier customers, enabling competitive carriers to satisfy their end-user customers' expectations. Reporting measurements by category of customer, including an incumbent LEC's affiliate(s) and retail customers, will enhance the ability of the Commission and competitive carriers to detect (and deter) unreasonable discrimination. Without performance standards, measurements and reporting, competition will suffer, slowing growth in the Internet and the provision of advanced services.

Exposing incumbent LEC provisioning and maintenance performance to the light of day through specific reporting requirements likely will discourage poor performance and unreasonable discrimination. Nonetheless, a swift and sure enforcement plan is required if the performance measures are to be truly effective. WorldCom proposes a remedy plan that provides for a prompt finding of liability and assessment of both forfeitures and damages if an incumbent LEC's performance report indicates that it has failed to meet performance standards or failed to provide services at parity. To address a pattern of continued violations, WorldCom proposes additional penalties, including suspension of Section 271 authority.

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WorldCom, Inc. (WorldCom) submits these comments in response to the Notice of Proposed Rulemaking released on November 19, 2001 in the above-captioned proceeding.[1]

[1] *In the Matter of Performance Measurements and Standards for Interstate Special Access Services,* CC Docket No. 01-321, 2001 FCC Rcd 6243 (2001) (*NPRM*).

I. INTRODUCTION

Over the past several years, large incumbent local exchange carriers (LECs) have subjected competitive carriers to unreasonable practices, unreasonable discrimination and great uncertainty in connection with the provisioning and maintenance of interstate special access services on which competitors rely to serve their end-user customers. The ongoing pattern of unacceptable performance by the incumbent LECs with respect to provisioning and maintenance of special access circuits includes, *inter alia*, late delivery of Firm Order Confirmations (FOCs), long proposed installation intervals, missed installation dates and poor maintenance and repair, all of which harm the competitors' relationships with their own customers. This poor and unpredictable performance harms carriers and end-user customers alike. Moreover, there is a significant risk that as the Bell operating companies (BOCs) begin offering interLATA services they will use their dominant position in the special access market to harm competition in the broader market for local data and long distance services.

Without timely delivery of a FOC, for example, a competitive carrier cannot provide timely information to its end-user customer regarding when the end user can expect service. Lengthy installation intervals make it impossible for competitors to fill their customers' orders in a reasonable time frame. Poor provisioning and maintenance by the incumbents also degrade the quality of service competitive carriers are able to provide their end-user customers. The incumbent LECs' shortcomings in providing adequate wholesale service clearly hurt the ability of competitive carriers to meet the demands of their own retail customers.

The incumbents' poor and unpredictable performance is inexcusable, particularly given that they have over twenty years of experience in providing special access. While the incumbent LECs would have this Commission believe that their performance problems are due to an inability to keep up with the unforeseen demand over the past five years, that excuse wears thin as the number of competitors (and orders) continues to dwindle in the current economic downturn.

The incumbent LECs have consistently failed to provision special access services within reasonable time frames. Presumably, the incumbent LECs would prefer to squeeze competitors out of the market (as monopolists are apt to do) rather than compete fairly for end-user customers. Competitive carriers are increasingly concerned that the incumbent LECs are performing poorly in providing service to their wholesale carrier customers, while providing higher quality service to their retail customers. This concern only grows as the BOCs gain authority to provide in-region interLATA services and can begin to compete head-to-head with WorldCom and other wholesale customers in the provision of long distance services to business customers, including large enterprise customers serving multiple locations. WorldCom serves as many customers and locations as possible using its own facilities. However, business customers with multiple locations spread throughout the country often require connections in areas and buildings served only by the incumbent LEC.

Incumbent LECs are able to mistreat their wholesale customers with impunity because they control the "last mile" facilities required by wholesale customers to complete their networks. Special access is a critical factor of production and a key input of all carriers' ability to serve high-volume businesses and institutions. Incumbent LECs undoubtedly know that their facilities, particularly their loops, are the only facilities serving most buildings. Nonetheless, the incumbent LECs tout the existence of large numbers of competitors from which special access services may be purchased and contend that this proves the special access market is competitive. Nothing could be further from the truth. Many competitive access providers (CAPs) still depend on the incumbent LECs for access to buildings, as do other competitive providers. Economic and other practical considerations make it impossible for competitors to replicate the ubiquitous reach of the incumbents' networks, and the situation is unlikely to change in the near- or medium- term, if ever.

The incumbent LECs have been unreasonably slow in filling orders for wholesale special access services. The performance data provided to wholesale carrier customers are neither comprehensive nor meaningful; worse yet, they are late and unreliable. Moreover, even in those instances in which poor performance or discriminatory behavior by the incumbent LEC can be detected, competitors currently have little or no recourse. Incumbent LECs' tariffs contain few performance standards and provide no meaningful remedy in the event of poor performance or discrimination.

State commissions seeking to address these problems have been hampered by incumbent LEC arguments that the states lack jurisdiction over interstate special access. Business managers at competitive carriers meet constantly with the incumbents to discuss poor performance by the incumbent LECs, but they have little or no leverage to force the incumbents to resolve their performance problems. In May 2001, the Chairman of the New York Public Service Commission (PSC) sent a letter to Chairman Powell, stating that Verizon's provisioning performance in New York was significantly below the PSC's service quality standards and that Verizon might be treating other carriers less favorably than its own end users.[2] The New York PSC asked the FCC to provide assistance in improving the quality of special access services provided by Verizon.[3] The FCC can respond to this request by adopting the performance

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[2] Letter from Maureen O. Helmer, Chairman, New York PSC, to Michael K. Powell, Chairman, FCC (May 22, 2001).

[3] *Id*.

measurements, standards and reporting requirements proposed by the Joint Competitive Industry Group, and by imposing meaningful penalties on Tier 1/Class A incumbent LECs[4] that engage in unreasonable special access provisioning and maintenance practices or unlawfully discriminate against their wholesale carrier customers. Without swift and decisive action by this Commission, the incumbent LECs will be able to use their market power in the provision of wholesale special access services to thwart competition for exchange access and interexchange services to businesses and other high-volume customers.

II. COMPETITIVE CARRIERS MUST HAVE TIMELY AND RELIABLE PROVISIONING AND MAINTENANCE OF INCUMBENT LEC-PROVIDED INTERSTATE SPECIAL ACCESS SERVICES TO SERVE THEIR BUSINESS CUSTOMERS

A. Incumbent LEC Special Access Services Are an Essential Input in the Provision of Data and Voice Services to Business Customers

WorldCom relies heavily on incumbent LECs' special access services in the provision of voice and data services to its enterprise customers, especially those with multiple locations. Special access service provides an unswitched transmission path between two or more points. Interstate special access is commonly used to allow customers with significant traffic volumes to connect directly to an interexchange carrier's (IXC's) point of presence (POP).[5] For example, when WorldCom provides service to a business customer, it uses special access to offer direct access between the customer's building and WorldCom's POP as part of its service package.

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[4] " Tier 1 LECs, also known as Class A LECs, are companies having annual revenues from regulated telecommunications revenues equal to or above the 'indexed revenue threshold.'" *Local Exchange Carrier's Rates, Terms and Conditions for Expanded Interconnection through Physical Collocation for Special Access and Switched Transport*, CC Docket No. 93-162, 14 FCC Rcd 987 at ¶ 2, n. 1 (1999) (the indexed revenue threshold is equal to $100 million, adjusted for inflation, for the period from October 19, 1992 to the given year.) WorldCom proposes that the performance measurements, standards and remedies discussed in these comments and the Joint Competitive Industry Group's Proposed Metrics be applied only to Tier 1 incumbent LECs.

[5] A POP is the physical point where an IXC connects its network with the incumbent LEC's network. *NPRM* at ¶ 1, n. 2.

Interstate special access usually consists of a local loop, or channel termination, between the customer's premises and that customer's serving wire center, and interoffice transport from the serving wire center to the IXC's POP.[6] The local loop and interoffice transport are provided using the same facilities the incumbents use to offer loop and transport unbundled network elements (UNEs).

Carriers rely on special access to obtain critical last-mile and interoffice connectivity between their networks and their end-user customers. This connectivity is available in a host of configurations, and can be used to support the provision of a wide variety of services.[7] WorldCom, for example, uses special access in the provision of local exchange service, interexchange service, in-bound toll free service, virtual private networks, dedicated Internet access, frame relay service, ATM service, gigabit ethernet service, local and wide-area networks, and other voice and data services.

1. Poor performance by incumbent LECs in providing wholesale special access services harms competitors serving enterprise customers

Poor provisioning of wholesale special access services can cause significant injury to competitive carriers serving all types of business customers. The threat to competition for multi-location business customers is particularly affected by the BOCs' ability to offer interLATA long distance services. Special access services should not be viewed in isolation – on either a product-specific or location-specific basis – but rather as key inputs into the broader and larger

[6] Special access services may also include multiplexing. For example, a carrier might order a DS-1 channel termination between a customer's premises and that customer's serving wire center and request that the channel termination be multiplexed onto DS-3 interoffice transport between the serving wire center and the IXC's POP.

[7] For example, special access facilities can be configured to support: analog/voice grade service; metallic and/or telegraph service; audio, video, and digital data service (DDS); digital transport and high capacity service (DS-1, DS-3, and OCn); collocation transport; links for SS7 signaling and database queries; SONET access; and broadband Internet access service among other services.

market for enterprise telecommunications services. Large enterprise customers seek a single provider that can serve all of their locations (sometimes throughout a region, or even throughout the country), allowing for complete integration of all their telecommunications services. To compete effectively for an enterprise customer's business, a carrier must be able to obtain "last-mile" access to all of the customer's locations, the majority of which are served only by incumbent LEC facilities. Poor provisioning or maintenance of the links to any of an end-user customer's locations can seriously undermine a carrier's ability to remain competitive in the market.

The incumbent LECs' performance in the wholesale special access market is a critical component of competition in the retail enterprise business market. Currently, the large enterprise market is served primarily by IXCs, because most customers have locations in multiple LATAs, and the BOCs have not been permitted to provide interLATA services in most of their in-region states. As the BOCs' section 271 applications are granted, and the restrictions on their ability to offer interLATA services are lifted, the BOCs are increasingly poised to compete directly for these customers. The BOCs' incentive to engage in anti-competitive behavior (both in the form of poor performance and unreasonable discrimination) will increase significantly as they gain authority to provide long distance service.

This incentive to engage in anti-competitive conduct is consistent with the well-established economic theory of exclusionary behavior.[8] According to this theory, a firm with "upstream" control over inputs into a "downstream" market has an incentive to use its power in

[8] S. Salop and D. Scheffman, *Raising Rivals' Costs*, 73 Amer. Econ. Rev. 267 (1983); T. Krattenmaker and S. Salop, *Antitrust Analysis of Exclusionary Rights: Raising Rivals' Costs to Gain Power Over Price*, 96 Yale LJ 209 (1986). The theory of exclusionary behavior is not only well established in academic literature and antitrust law, it has long been used in the regulation of telecommunications markets. *See, e.g.*, *Regulatory Treatment of LEC Provision of*

the upstream market to achieve, enhance, or maintain power in the downstream market. The firm can accomplish its anticompetitive goals by using its power in the upstream market to raise rivals' prices, degrade the quality of service it provides its rivals, or delay or deny access to downstream rivals.

In practice, the theory of exclusionary behavior suggests that the BOCs will use their power in the upstream special access market to gain an unfair advantage in the downstream business market by discriminating against competitors in the provisioning and maintenance of special access services. For example, the incumbent LECs can harm their rivals' positions in the retail market for voice and data services by providing them poor-quality wholesale special access services or untimely installation of wholesale special access orders. Furthermore, it seems highly likely that the gain to the BOCs from this exclusionary behavior will far exceed any loss from reduced profits in the upstream special access market.[9]

Antitrust theory therefore dictates that the incumbent LECs' performance problems in special access markets should be considered anticompetitive, exclusionary behavior designed to harm their rivals in the retail market for enterprise customers. Poor or discriminatory performance in the wholesale special access market is a lever, upon which a small amount of force can create a large amount of damage to competitors in the enterprise business market. One or two missed special access provisioning dates by an incumbent LEC can cost its competitor its entire relationship with an enterprise customer, translating into potentially millions of dollars in lost business and goodwill. This fact has two important implications.

Interexchange Services Originating in the LEC's Local Exchange Area, CC Docket No. 96-149, 12 FCC Rcd 15756 (1997).

[9] *See* Declaration of Michael L. Katz and Steven C. Salop, *Using a Big Footprint to Step on Competition: Exclusionary Behavior and the SBC-Ameritech Merger,* Comments of Sprint, CC Docket No. 98-141 at Attachment B (October 15, 1998) (assessing the trade-off between lost

First, the incumbent LECs can use their control over the last mile in even a few geographic markets to cause damage on a nationwide scale. Failure by the incumbent LECs to provision DS-1 channel terminations on a nondiscriminatory basis, to a limited number of well-chosen locations could have negative consequences for competition in the entire nationwide enterprise market. As long as the incumbents control the upstream market in key areas where enterprise customers seek service, they can rely on exclusionary behavior to thwart competition in the broader enterprise market.

The second implication of the incumbent LECs' ability to leverage their power in the special access market to harm competition in the enterprise market relates to the assessment of penalties. Penalties for poor or discriminatory performance in special access markets should reflect the disproportionate impact that poor service in that market can have in the broader enterprise market. Thus, for example, if an incumbent LEC fails to install a DS-1 circuit in a timely manner, the penalty should not be based on the relatively low price of the particular circuit involved, but in terms of the larger harm that the incumbent's poor performance might have caused to the competitive carrier's relationship with its customer and the carrier's reputation with potential customers.

2. WorldCom and other carriers are heavily dependent on incumbent LEC special access to reach their customers

Competitive carriers depend primarily on the incumbent LECs for their special access needs. In the past year, approximately 90 percent of WorldCom's off-net special access circuit needs were provisioned by the incumbent LECs, even though it is WorldCom's policy to use the local facilities of WorldCom or other competitive carriers whenever such facilities are

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profits in upstream markets and gained profits in downstream markets in the context of the SBC-Ameritech merger).

available.[10] Despite WorldCom's efforts to find alternatives, in the vast majority of cases, WorldCom is forced to use incumbent LEC special access services.[11]

Competitive carriers' dependence on incumbent LEC special access services is particularly acute for the "last mile" or "channel termination" portion of special access circuits. While competitive LECs have extended their fiber networks to some of the larger office buildings in dense urban areas, competitive LEC-served buildings still represent only a small fraction of the special access customer base. Even in the most competitive area in the country – LATA 132, which includes New York City[12] – the New York Public Service Commission (PSC) concluded that Verizon's network "dwarfs its competitors."[13] While Verizon's network serves 7,364 buildings in LATA 132 over fiber, fewer than 1,000 buildings are served by most competitive LECs' fiber networks.[14] This disparity in buildings served by fiber is magnified by the fact that Verizon's ubiquitous copper loops allow it to provision DS-1, voice grade, and other low-speed special access services to thousands of other special access customer locations that competitors' networks do not reach.[15]

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[10] For every customer order, it is WorldCom's policy to evaluate whether it can self-provide special access over its own local network (*i.e.*, "on-net") or, if no WorldCom facilities are available, whether another competitive carrier can provide the required facilities. Only if access cannot be provided through the use of WorldCom or CAP facilities does WorldCom utilize incumbent LEC facilities.

[11] Although some CAPs compete with incumbent LECs to provide, on a wholesale basis, the physical facilities needed for dedicated access, the number of customers they reach is *de minimis*. These CAPs often rely on the incumbents for access to buildings as well.

[12] The FCC has consistently recognized that LATA 132 is the most competitive area in the nation, and has found that the high volume of traffic in lower Manhattan "presents special opportunities for the development of competition." *NYNEX Telephone Companies Petition for Waiver*, Memorandum Opinion and Order, 10 FCC Rcd 7445, 7463-7464 (1995).

[13] New York Public Service Commission, *Opinion and Order Modifying Special Services Guidelines for Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Reporting*, Case Nos. 00-C-2051, 92-C-0665 at 7 (June 15, 2001) (*NY Special Services Order*).

[14] *Id*.

[15] *Id*. at 7-8.

Competitors' dependence on incumbent LEC special access services is even more pronounced elsewhere in the nation. For example, only five percent of commercial tenants nationwide have access to competitive telecommunications services.[16] By contrast, the incumbent LECs' expansive networks reach virtually all commercial office buildings, tens of thousands of cell sites, and thousands of other special access customer locations. Most tellingly, even in the most competitive serving areas[17] in major cities, approximately 87% of the buildings where WorldCom has customers are served only by incumbent LEC facilities.

3. Competitors' reliance on incumbent LEC facilities is unlikely to change in the foreseeable future

There is little prospect that competitive LEC or IXC dependence on incumbent LEC special access services will diminish in the foreseeable future. Even though competitive LECs have been building local fiber networks for over a decade, they still reach only a very small percentage of special access customer locations. The extension of competitive LEC networks to additional buildings is limited by the fixed costs of constructing a spur from a competitor's fiber ring to a building. Because the construction costs are so high, only a limited number of buildings – such as carrier hotels, Internet Service Provider POPs, and large office buildings that require several DS-3 or OC-n circuits – generate sufficient revenues to justify the up-front investment needed to add them to a competitive LEC's fiber ring. Because of the limited revenue potential of most special access locations, it is almost never economically viable for competitors to extend

[16] *See, e.g.,* ALTS, *The State of Local Competition 2001*, at 28 (2001), *available at* *http://www.alts.org/filings/022001annualreport.pdf* (last visited January 18, 2002) (also noting that "less than 1% of residential tenants … have access to competitive telecommunications services.")

[17] The most competitive serving areas are those served by central offices in which CAPs have collocated.

their networks to additional buildings.[18] In addition, the ability of competitive LECs to add buildings to their networks is also constrained by their limited capital budgets. These constraints have become even more severe given the downturn in the capital markets and the financial difficulties faced by many competitive LECs. An increasing number of competitive LECs are filing for bankruptcy protection, ceasing operations, or reducing their footprints. As a result, WorldCom has been forced to move end users off competitive carriers' networks and instead serve them using incumbent LECs' special access services. Finally, pursuant to their pricing flexibility authority, the incumbent LECs have locked large IXCs such as WorldCom and AT&T into volume and term contract commitments so that even if CAPs do construct facilities they are unable to compete for IXCs' business.

B. Incumbent LEC Special Access Performance Is Unacceptably Poor

1. The ordering, provisioning and repair process[19]

After WorldCom receives an order from a customer requiring special access, the order is entered into WorldCom's operations support system (OSS), reviewed for accuracy, and forwarded to WorldCom's provisioning groups to engineer the circuits. WorldCom's provisioning groups check to see if WorldCom has adequate facilities to handle all segments of the customer's order. If WorldCom does not have its own facilities for a given segment (*e.g.*, for the last mile to a particular customer premises), and if no CAP facilities are available,[20] WorldCom then places an order with the incumbent LEC serving the customer's premises by

[18] As monopoly providers operating under rate-of-return regulation, incumbent LECs had the incentive and ability over an extended period of time to build out their networks ubiquitously. As a result, the incumbents already have facilities in place for virtually every building within their region.

[19] While this section describes the process WorldCom follows for the orders it places with incumbent LECs, we believe that incumbent LECs follow similar (if not identical) steps in handling orders for retail customers.

[20] As noted above, in the vast majority of cases, no CAP facilities are available.

submitting an Access Service Request (ASR). The ASR is an industry form developed by the Ordering and Billing Forum and contains detailed information including: end-user customer premises address; billing name and billing address; technical specifications for the service requested; the requested due date; and the names and telephone numbers of WorldCom contacts.[21] WorldCom generally transmits ASRs to incumbent LECs electronically.[22]

When the incumbent LEC receives the ASR, it responds by sending an electronic acknowledgment. This acknowledgment is merely an indication the order was received and does not indicate whether or when the incumbent LEC will install the requested facilities. A separate electronic transmission, called a Firm Order Confirmation (FOC), specifying a due date is issued after the incumbent LEC receives a "clean" ASR.[23]

It is via the FOC that the incumbent LEC provides a due date for the installation of the requested facilities (the FOC Due Date).[24] WorldCom relies on the FOC Due Date to notify its own customers of the date on which the facilities will be installed.[25] If WorldCom technicians

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[21] Competitors must keep track of each incumbent's procedures and make sure that each ASR conforms to the requirements of the specific incumbent LEC that is providing the requested service.

[22] Smaller competitive carriers and smaller incumbent LECs may use a manual process.

[23] A "clean" ASR is one that the LEC has accepted as being accurate and properly formatted with all of the relevant fields filled in correctly. An incumbent LEC may reject an ASR if it determines that information is missing, misstated or incorrectly formatted. (An incumbent LEC may also issue a query if it has a specific question about an ASR – queries are usually made by telephone or via email.) An incumbent LEC may reject the same ASR multiple times if it finds more than one problem with the ASR. Once WorldCom receives an electronic rejection from the incumbent LEC, it must correct, or "supplement," the ASR and re-send it, starting the whole process all over again. The intervals discussed in section IV.B, below, are measured from the date an acceptable, or clean, ASR is accepted by the incumbent LEC, rather than from the date the carrier customer first sends an ASR.

[24] Although WorldCom expects that an incumbent LEC will at least conduct an electronic check to determine that facilities are available before committing to the FOC Due Date, it not clear that the incumbents make any effort to determine if facilities are available before issuing a FOC.

[25] If the retail customer decides to change the installation date, WorldCom must issue a "supplement" to its original ASR. This supplement is treated as a new ASR, requiring a new FOC, and all intervals are then calculated based on the supplemental ASR's submission date.

need to be on-site for the installation, those technicians are then scheduled, as are any other parties (*e.g.*, equipment vendors) that may need to be present when the circuits are installed.

WorldCom expects the incumbent LEC to install the requested facilities on the FOC Due Date. If the LEC knows in advance that it will not be able meet the date it established in the FOC, it is general industry practice that it issue a jeopardy notification, notifying WorldCom that the work needs to be rescheduled. However, that process is neither uniform nor consistent. While there is no electronic format for jeopardy notifications (most jeopardy notifications are made by telephone), WorldCom expects that the incumbent LEC, in its jeopardy notification, will explain why the work cannot be completed on schedule and provide a new installation date.

Incumbent LECs frequently issue "unsolicited" FOCs, which essentially are notifications that the incumbent LEC has unilaterally rescheduled the FOC Due Date. These unsolicited FOCs are used to "reset the clock" for the previously-established installation date, thus permitting the incumbent LECs to report that they have installed service "on-time," even though they missed the original FOC Due Date.

In addition, there are certain circumstances where an incumbent LEC's failure to meet the FOC Due Date is based on circumstances beyond its control. For example, WorldCom, the end user, or a third-party vendor (such as a customer's CPE vendor) may not be ready for the installation. These situations are referred to as "customer not ready" (CNR) situations. A missed installation date that is caused by a verifiable CNR generally is considered to be "on-time" for purposes of evaluating the incumbent LEC's performance.[26]

[26] There is some concern that the incumbent LECs may be abusing the CNR exception by claiming that installations were missed due to CNRs even when the customer was ready, or could have been ready within a short time. The BOCs have recently given informal agreement in principle to employ a "verifiable CNR" which, if used properly, would prevent abuse of the CNR designation. The verifiable CNR requires the BOC to contact WorldCom whenever the BOC believes a CNR situation exists, and to give WorldCom fifteen minutes to verify and rectify the

Once the incumbent LEC actually installs the requested facilities, it issues a notice of completion. This notification can take place by fax, email, or even by phone. After WorldCom receives this notification, it enters the completion date into its OSS systems. WorldCom's systems then compare the actual installation date with the due date indicated on the FOC.

2. Incumbent LEC Firm Order Confirmations and installations are often late and unreliable

Although WorldCom consistently follows the incumbent LEC-mandated ordering process outlined above, the incumbents themselves frequently fail to adhere to their own procedures. The incumbents' performance problems are pervasive, ranging from their inability (or refusal) to issue FOCs in a timely manner to their propensity for missing the installation dates they establish in the FOCs. For example, once an incumbent LEC receives a clean ASR, WorldCom expects the incumbent LEC to check its facilities and return a FOC within a specified time frame (*e.g.*, within 48 hours of receiving the ASR), so that the carrier customer can schedule other activities related to the installation and provision of service to the end-user customer. Currently, FOC response time frames are unpredictable and the incumbent LECs do not publish any intervals for returning a FOC after they receive a clean ASR.

The incumbents' delays in issuing FOCs make it difficult for WorldCom and other carriers to manage their relationships with their own customers. WorldCom's customers,

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problem. (To facilitate this process, each ASR lists a toll-free number that the LEC's personnel can call if they believe the installation may be affected by a CNR situation.) If the CNR is verified and the situation is not resolved after the fifteen minutes have expired, the installation does not count as a missed installation by the incumbent.

The verifiable CNR benefits both the competitive carrier and the incumbent LEC. It allows the competitive carrier to avoid the disruption of having installations missed due to easily remedied CNR situations (for example, the customer steps out for a moment to pick up lunch just before the incumbent's technicians arrive, but is otherwise ready for the installation to be completed). A verifiable CNR can also help the incumbent LECs avoid the expense of sending technicians out twice to complete the same order. Increased coordination between incumbent LECs and competitive carriers could further minimize the number of CNR situations that prevent scheduled installations from taking place on time.

understandably, want to know when they can expect installation of the facilities needed to turn up their service. As explained above, WorldCom cannot provide its customer with an installation date until it has received a FOC from the incumbent LEC. When delays by the incumbent LEC prevent WorldCom from providing its customers with installation dates, the customers blame WorldCom, not the incumbent LEC.[27]

An incumbent's unreasonable delay in issuing a FOC is often exacerbated by its failure to agree to the installation date, or interval, that WorldCom requested in its ASR. Thus, not only does WorldCom have to wait to tell its customer when the installation can take place, it often must inform the customer that it will not be able to meet the installation date the customer requested. In 2001, offered intervals increased, and incumbent LECs still failed to complete installation in a large percentage of cases. For example, for the three months ending May 2001, the interval offered by the incumbent LECs (*i.e.*, the interval between the ASR and the FOC Due Date) increased by seven business days for DS-3 circuits and by four business days for DS-1 circuits compared to the intervals offered in the first quarter of 2000. Despite these increases in the offered intervals, the incumbent LECs' on-time performance continues to be unsatisfactory at best. For example, from January 2000 through May 2001 the incumbent LECs failed to meet their installation dates 40% of the time for DS-1 circuits and 55% of the time for DS-3 circuits.[28] In other words, more than half of the DS-3 special access circuits ordered from the incumbent LECs were installed after the due date that incumbent LECs provided in their FOCs.[29]

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[27] An incumbent LEC's failure to provide a FOC on time also impairs WorldCom's ability to coordinate with third-party vendors (such as PBX vendors) and its ability to schedule its technicians.

[28] For the three months ending May 2001, actual installation intervals for special access services were 36 days for DS-3 circuits (an increase of 8 days from the first quarter of 2000) and 18 days for DS-1 circuits (an increase of 5 days from the first quarter of 2000).

[29] While there is some variation in incumbent LEC performance, installation intervals have deteriorated for all major incumbent LECs across the board.

The incumbents' ability to install facilities on the date identified in the FOC is critical. Customers require predictability in order to meet their own needs. When the incumbent LEC misses the installation date, WorldCom is unable to begin the customer's service on time, which can have a significant adverse impact on an enterprise customer's operations.

Between the incumbent's delays in issuing a FOC, the incumbent's decision to unilaterally move the proposed installation date requested by WorldCom and its failure to meet even this postponed date, it is altogether too common for WorldCom to: (1) have to wait an inordinate amount of time before it can provide its customer with an installation date; (2) have to inform the customer that it will not be able to meet the installation date the customer requested; and (3) fail to meet the already delayed installation date WorldCom was finally able to commit to meeting. Thus, poor on-time performance by an incumbent LEC harms WorldCom's ability to compete and may cause WorldCom to fail to comply with service level agreements, forcing WorldCom to make payments to its end-user customer. In addition, poor on-time performance by the incumbent LEC may result in an end-user customer becoming dissatisfied with WorldCom and perhaps switching to another carrier, with a concomitant loss of revenue to WorldCom.

3. Poor maintenance and repair services by the incumbent LECs can also harm competition

Along with ordering and provisioning, maintenance and repair performance also have a significant impact on customer satisfaction. For example, when a new circuit fails shortly after installation, it reflects badly on WorldCom, even though the fault likely lies with the incumbent that installed the circuit. High-volume enterprise customers expect a significant degree of reliability in the services they receive. Similarly, when the incumbent LEC takes a long time to restore malfunctioning circuits and return them to service, WorldCom's customers blame

WorldCom for the service interruption. The two most critical factors in ensuring customer satisfaction are reliability and, when service is interrupted, offering predictability as to when service will be restored.

C. The Incumbent LECs' Poor Performance is Unreasonably Discriminatory

The incumbent LECs' poor provisioning and maintenance performance would be bad enough if it were due to mere ineptitude. However, as explained above, incumbent LECs have the ability and an incentive to discriminate against their wholesale customers (carriers such as WorldCom) by providing them with inferior special access services while providing superior service to their own retail end-user customers. In fact, there is evidence that the incumbents have engaged in such discrimination.

For example, the New York PSC has found that data provided by Verizon suggests that "Verizon treats other carriers less favorably than its retail customers" regarding the provisioning of special access services.[30] According to the New York PSC, Verizon has "failed to refute this prima facie evidence" indicating it provides wholesale special access services in a discriminatory manner.[31] The New York PSC also noted that '[p]erformance deficiencies have characterized Verizon's service over the past four years."[32] Moreover, the discrimination between wholesale and retail provisioning of these services is likely to get worse as Verizon receives authority to

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[30] *NY Special Services Order* at 5 (finding that Verizon meets only 76% of its provisioning appointments for wholesale customers, compared to 96% for its retail customers); *id*. at 16 (stating that "Verizon provides inferior service to competitive carriers in the provisioning of special services."). As used by the New York PSC, the term "special services" includes not only special access services, but also private line and local services. New York Public Service Commission, *Order Denying Petition for Rehearing and Clarifying Applicability of Special Services Guideline*, Case Nos. 00-C-2051, 92-C-0665 at 1, n. 1 (December 20, 2001) (*NY Special Services Rehearing Order*) (stating that special services "are known as 'special access' when provided pursuant to federal tariffs."); *see also NY Special Services Order* at 1.

[31] *NY Special Services Order* at 6.

[32] *Id*. at 2; *see also id.* at 5 (finding that the data indicate that that Verizon's provision of special access services is "below the threshold of acceptable quality.")

offer long distance service in additional states. The New York PSC clearly recognized the consequences of Verizon's poor performance, explaining that "[b]ecause competitors rely on Verizon's facilities . . . Verizon represents a bottleneck to the development of a healthy, competitive market for special services."[33]

D. State Commissions Have Noted Problems with Special Access Quality

Several other states also have acknowledged growing concerns over problems with incumbent LECs' special access performance. For example, the Minnesota Public Utilities Commission (PUC) found a "clear need for further investigation, careful monitoring, and potentially, wholesale access service quality standards for U S WEST . . .."[34] The Minnesota PUC was concerned about "the serious possibility that the quality of U S WEST's wholesale access services may jeopardize [the] important goal" of ensuring reliable, high quality long distance service between all Minnesota households and businesses.[35]

Recognizing the importance of this issue,[36] several states have acted to address the problems associated with special access.[37] As this Commission is aware, the New York PSC

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[33] *Id.* at 9; *id.* at 6-9 (explaining Verizon's market dominance).

[34] *In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. Against U S WEST Communications, Inc. Regarding Access Service*, Docket No P-421/C-99-1183 at 15 (Aug. 15, 2000) (*Minnesota Access Order*).

[35] *Minnesota Access Order* at 15.

[36] The New York PSC, for example, recently found that special access services are critical to businesses, the "new economy," and competitive carriers; concluded that Verizon was still the dominant provider; and found that regulation of this and the lingering "last mile monopoly" is still essential. *New York Special Services Order; see also NY Special Services Rehearing Order* at 10.

[37] *See, e.g.*, Texas PUC, *Section 271 Compliance Monitoring of Southwestern Bell Telephone Company of Texas*, Project No. 20400, Order No. 33, Approving Modificiation to Performance Remedy Plan and Performance Measurements, (May 24, 2001). *See also* Colorado PUC, *In the Matter of the Investigation Into Alternate Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Decision on Motions for Modification and Clarification of the Colorado Assurance Plan at 31-33 (November 5, 2001) (stating that "…to the extent a CLEC orders special access in lieu of UNEs, SWBT's performance shall be measured as another level of disaggregation in all UNE measures.").

recently mandated the continued review of all special services circuits ordered from Verizon and directed Verizon to provide the New York PSC with performance data on all circuits.[38] Similarly, the Massachusetts Department of Telecommunications and Energy (DTE) recently ordered Verizon to report performance data for interstate special access services in the same manner as it reports data on intrastate special access services.[39] The Indiana Utilities Regulatory Commission (URC) has also indicated that it is "leaning toward requiring SBC/Ameritech to develop performance measurements and business rules for special access."[40] Many other state commissions are also currently considering issues related to special access concerns.[41]

State commissions' efforts to address these concerns have been affected, however, by the "mixed use" rule, which has created some question regarding state authority over special access services. Under the "mixed use" rule, a circuit is considered to be "interstate" if 10 percent of

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[38] *See NY Special Services Order* at 20 –24 (ordering Verizon to report on eight performance measurements related to special access); *NY Special Services Rehearing Order* at 1 (noting that "[f]or reporting purposes, all special services are addressed by the Commission's Special Service Guidelines.") The New York PSC has asked the FCC for assistance in improving Verizon's performance for interstate special access services. *See* Letter from Maureen O. Helmer, Chairman, New York PSC, to Michael K. Powell, Chairman, FCC (May 22, 2001). The FCC has not yet taken action on this request.

[39] *See* Massachusetts Department of Transportation and Energy, *Investigation by the Department of Telecommunications and Energy on its Own Motion Pursuant to G.L. c. 159 §§ 12 and 16, into Verizon New England Inc. d/b/a Verizon Massachusetts' Provision of Special Access Services*, DTE 01-34 at 12 (August 9, 2001) (*Massachusetts Special Access Order*).

[40] *See* Indiana URC, *In the Matter of the Petition of Indiana Bell Telephone Company, Incorporated, d/b/a Ameritech Indiana, Pursuant to I.C. 8-1-2-61 for a Three-Phase Process for Commission Review of Various Submissions of Ameritech Indiana to Show Compliance with Section 271 of the Telecommunications Act of 1996*, Case No. 41657, Attachment A, at A-33 (September 11, 2001).

[41] These states include Tennessee (Tennessee Regulatory Authority, *Generic Docket On Performance Measurements*, Docket No. 01-00193), Georgia (Georgia PSC, *Performance Measurements for Telecommunications Interconnection, Unbundling and Resale*, Docket No. 7892-U), Illinois (Illinois Commerce Commission, *Wholesale Performance Measures Rulemaking – Code Part 731*, Docket No. 01-0539), and Rhode Island *(See* State of Rhode Island and Providence Plantations PUC, *In Re. Verizon-Rhode Island's Proposed Carrier-To-Carrier Performance Standards and Reports and Performance Assurance Plan for Rhode Island*, Docket Nos. 3195, 3256 (December 3, 2001)).

the traffic traversing the circuit is interstate.[42] Thus, any circuit carrying 10 percent or more interstate traffic should be purchased from an incumbent LECs' FCC interstate tariff, and is subject to FCC jurisdiction, even though up to 90% of the traffic over those circuits may be intrastate.[43] Some state commissions have therefore declined to assert jurisdiction over the vast majority of special access circuits.[44]

E. Competitors Cannot Rely on Unbundled Network Elements or Existing Tariffs to Address Problems with Special Access

1. Unbundled network elements

Some have suggested that if competitive carriers are dissatisfied with the incumbent LECs' provision of special access, they should turn to UNEs as an alternative provisioning method.[45] Competitors cannot rely on UNEs as substitutes for special access, however, for a number of reasons. First, the incumbent LECs' provisioning of UNEs can be even more unreliable than their provisioning of special access. In fact, the incumbent LECs' inability to provision UNE loops and transport in a timely manner has driven many competitors to order circuits out of the incumbents' higher-priced special access tariffs in the hope of obtaining better service. In addition, UNE orders are often rejected because the incumbent LEC claims that it has

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[42] 47 C.F.R. § 36.154.

[43] *See, e.g.*, *NY Special Services Rehearing Order* at 1. For example, in Massachusetts an overwhelming 99.4% of Verizon's special access services are provisioned under federal tariffs. *See Massachusetts Special Access Order* at 2.

[44] A small number of state commissions have been willing to assert jurisdiction over special access provisioning. *See* Washington UTC, *In re the Complaint of AT&T Communications of the Northwest, Inc., v. U S WEST Communications, Inc., Regarding the Provision of Access Services*, Tenth Supplemental Order, Docket No. UT-991292 at ¶ 28 (May 18, 2000) (holding that "[i]n the absence of clear authority that a customer's election to take service under a federal tariff per the 10% rule preempts all state regulatory authority, we decline to so rule"); *see also* Minnesota PSC, *In the Matter of the Complaint of AT&T Communications of the Midwest, Inc., Against U S WEST Communications, Inc. Regarding Access Service*, Docket No. P-421/C-99-1183 at 4-11 (August 15, 2000).

[45] As noted above, the facilities used to provide special access are identical to those the incumbents use to provide loop and transport UNEs.

no facilities available, and contends that it need not build new facilities in response to orders for UNEs. If a carrier orders a circuit as special access, the incumbent will often provide facilities and service even if an order to provision the same circuit as a UNE was previously rejected by the incumbent LEC for lack of facilities. In these circumstances, a carrier has no choice but to provision its service using the incumbent's special access services rather than UNEs.

Even if WorldCom could rely on incumbent LECs to provision UNEs in a timely and reliable manner, existing restrictions on the use and limitations on the availability of UNEs mean that UNEs are not a viable substitute for special access. The U.S. Court of Appeals for the Eighth Circuit has held that while requesting carriers may order unbundled loops and unbundled dedicated transport, incumbent LECs are not required to combine those UNEs on behalf of requesting carriers.[46] This decision is currently being reviewed by the U.S. Supreme Court but, at least for the time being, it severely restricts competitive carriers' ability to rely on UNEs as a substitute for special access. Because competitors cannot rely on the incumbents to combine the loops and transport elements needed to reach many customers, they must combine the elements themselves. This requires a competitive carrier to bring the UNE loop into its own collocation arrangement and combine it with UNE transport at the collocation site. If the carrier is not collocated at the central office that serves a particular customer, it cannot perform the necessary combination. Thus, the Eighth Circuit's decision effectively prevents a competitive carrier from relying on UNEs to reach customers served out of a central office in which the carrier is not

[46] *Iowa Util. Bd. v. FCC*, 219 F.3d 744, 759 (8th Cir. 2000), *cert. granted,* 531 U.S. 1124 (January 22, 2001). The Eighth Circuit's ruling does not affect the FCC's existing rule prohibiting incumbents from separating previously combined UNEs. 47 C.F.R. § 51.315(b). Thus, competitors should still be allowed to convert existing special access circuits to UNEs. As explained below, however, the incumbent LECs have effectively stymied competitors' efforts to make such conversions.

collocated. In the vast majority of cases, the competitive carrier has no choice but to use incumbent LEC special access to connect these customers to the competitive carrier's network.[47]

Under the Commission's rules, competitive LECs may be entitled to convert existing special access arrangements to loop-transport combinations, known as enhanced extended links (EELs).[48] However, the Commission has placed interim restrictions on the use of EELs, explicitly prohibiting their use in many circumstances, and effectively making it all but impossible for carriers to obtain EELs. In order to protect incumbent LECs from losing revenues on their non-cost-based special access revenues, the Commission has restricted EEL conversions to those circumstances where a requesting carrier is providing "a significant amount of local exchange service."[49] The Commission has interpreted "a significant amount of local exchange service" to consist of three "safe harbors."[50] As a number of competitive carriers have demonstrated, these restrictions effectively prevent EELs conversions even for special access circuits that are used exclusively to provide local service.[51]

In particular, the prohibition on a practice described as "co-mingling" has been used by incumbent LECs to frustrate a significant number of potential conversions.[52] The incumbent

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[47] A very small minority of these customers are served by competitive fiber and/or wireless access facilities.

[48] 47 C.F.R. § 51.315(b).

[49] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order, CC Docket No. 96-98, 15 FCC Rcd 1761 at ¶ 5 (1999).

[50] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, CC Docket No. 96-98, 15 FCC Rcd 9587 at ¶ 22 (2000)(*Supplemental Order Clarification*).

[51] *See, e.g.,* Letter of Jonathan Askin, General Counsel, ALTS to Jodie Donovan-May, Common Carrier Bureau, FCC, CC Docket No. 96-98 (December 22, 2000); *see also* Petition of ITC^DeltaCom Communications, Inc. for Waiver of Supplemental Order Clarification, CC Docket No. 96-98 (August 16, 2001); *see also* Petition of WorldCom for Waiver of Supplemental Order Clarification (September 12, 2000).

[52] As used by the Commission, "co-mingling" is the practice of combining loops or loop-transport combinations with tariffed special access services. *Supplemental Order Clarification* at

LECs do not dispute that an individual circuit that is "co-mingled" on a higher capacity transport service may be used to provide "a significant amount of local exchange service." Nonetheless, they often refuse to convert these circuits to EELs. This practice makes it impossible for requesting carriers to convert existing loop-transport combinations to EELs whenever that combination is, at some point, multiplexed to a higher capacity transport service (*e.g.*, a DS-1 customer channel termination multiplexed to DS-3 interoffice facilities). Accordingly, competitive carriers cannot rely on UNEs, even to provide local service, but must depend on incumbent LEC special access services.

Even if the incumbent LECs applied the use restrictions as the Commission intended, they would still prevent competitors from using EELs to provide the vast majority of services – including the data services for which customer demand is growing the fastest. End-user customers using these services usually have a significant amount of interexchange traffic.

Finally, the incumbent LECs are seeking to further limit their unbundling obligations. For example, Verizon, SBC, and BellSouth have asked the Commission to eliminate unbundling obligations for all loops and transport links of DS-1 or greater capacity.[53] Such a limitation would make it impossible for competitors to use UNEs to provide high-capacity connections and force competitive carriers to rely solely on incumbent LEC special access for such connections.

¶ 28. For example, a competitive LEC might have a DS-1 circuit that is currently connected to a DS-3 hub in an intermediate end office. The competitive LEC should be able to convert that DS-1 to an EEL to provide local service without making any changes to its channel facility assignment on the DS-3 hub. Yet the incumbent LECs insist that this would amount to "co-mingling" of UNE and interstate special access circuits, which they argue is forbidden. In effect, the incumbent LECs would force competitive LECs to maintain two separate access networks – one for access to UNE circuits, the other for access to special access circuits.

[53] Joint Petition of BellSouth, SBC, and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport, CC Docket No. 96-98 (April 5, 2001).

2. Tariffs

The incumbent LECs have claimed in recent *ex parte* filings that, in "response to growing competition," they have added performance measures and other protections against deficient provisioning to their tariffs.[54] In fact, however, only a handful of incumbent LEC tariffs contain any provisions related to performance, and, to the extent such provisions exist, they were added unilaterally by the incumbent LEC and are not the product of negotiation between parties with similar bargaining power. Moreover, these provisions provide no meaningful remedies if the incumbent LEC fails to meet the offered performance measures.

For example, SBC's tariff provides for performance measures only for those customers that agree to obtain service under its "Managed Value Plan" (MVP), a volume and term plan contained in its interstate special access tariff. To obtain service under the MVP tariff, customers must agree to an array of conditions, including the competition-constraining requirement that customers forfeit discounts for special access services if they order more than a threshold number of UNEs.[55] Moreover, the MVP tariff offers only the most meager of performance plans: it measures only three parameters, measures those parameters against weak standards, does not apply them to all special access services (for example, it excludes DS-3 circuits), provides minimal compensation if those weak standards are not met[56] – and even that compensation is provided only if the customer achieves a minimum annual revenue commitment (MARC).[57]

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[54] Letter from W.W. Jordan, BellSouth, to Magalie Roman Salas, FCC (August 22, 2001); Letter from Brian J. Benison, SBC, to Magalie Roman Salas, FCC (August 17, 2001).

[55] SWBT Tariff FCC No. 73, § 38.3(D).

[56] SWBT Tariff FCC No. 73, § 38.3(G). Compensation is limited to a maximum of 2% of the carrier-customer's bill.

[57] Thus, if SBC fails to provide adequate performance even for the few standards and services to which the MVP performance plan applies, SBC does not have to pay any of the performance penalties if the customer suffers enough harm that it cannot meet its MARC.

The one-sided nature of the incumbent LECs' tariffs is best illustrated by the treatment of the "standard intervals" by which they will provision particular services. While the incumbent LECs publish standard intervals in their off-tariff policy guidelines, the tariffs do not provide for any customer compensation if the incumbent fails to provision an order within the offered interval.[58] On the other hand, the incumbent LECs penalize their carrier-customers by assessing extra charges if the customers request an installation interval that is less than the unreasonably long "standard interval." For instance, BellSouth now charges $200 per day for every order a customer requests to be installed in less than the standard interval,[59] and Verizon now charges $500 for every order a customer requests to be installed in less than the standard interval.[60]

III. THE COMMISSION HAS AMPLE AUTHORITY UNDER SECTIONS 201 AND 202 TO ADOPT PERFORMANCE METRICS

As the *NPRM* observes, "[t]he Commission has broad authority to establish national performance measurements and standards for special access services pursuant to sections 201 and 202 of the Act."[61] Pursuant to sections 201 and 202, the Commission may require incumbent LECs to comply with standards and reporting requirements designed to ensure that

58 Verizon emphasized this point in a recent letter to the FCC in which it stated that "nothing in Verizon's tariff or in the Standard Minimum Intervals requires Verizon to provision special access circuits by the FOC due date." Letter from Marie T. Breslin, Federal Regulatory Director, Verizon to Faye Jeter-Bragg, Market Disputes Resolution Division, Enforcement Bureau, FCC at 3 (July 10, 2001).

59 BellSouth Tariff FCC No. 1, § 5.1.1(H)(7).

60 Verizon Tariff FCC No. 11, §§ 5.2.2(D), 31.5.3.

61 *NPRM* at ¶ 8 (noting that "the Commission previously has applied the requirements of section 201 to special access services"). The Commission has emphasized its broad authority under sections 201 and 202 in various contexts. *See, e.g., In re Radiofone, Inc. v. BellSouth Mobility, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 6088 at ¶ 33 (1999) (acknowledging "the broad 'public interest' and 'just and reasonable' standards set forth in sections 201(b) [and] 202(a)"); *Amendment of Section 64.702 of the Commission's Rules & Regulations, Second Computer Inquiry,* Final Decision, Docket No. 20828, 77 FCC 2d 384 at ¶ 142 (1980) (*Computer II Order*) (acknowledging "broad consumer rights under Section 201(b) and 202(a)" and "corresponding carrier responsibilities").

special access services are provided to competitors in a manner that is just, reasonable, and not unreasonably discriminatory, without undue "delay, poor quality, and discrimination."[62]

A. The FCC Has Often Used its Authority under Section 201 and 202 to Prevent Abuses of Market Power

In the past, the Commission has used its broad authority under sections 201 and 202 to ensure that incumbent LECs cannot use their market power over an input service to diminish competition for services that depend on that input, and to "police the boundaries" between competitive and non-competitive services. For example, in *Computer II*, the Commission used its section 201 and 202 authority to require separate affiliates for competitive offerings (customer premises equipment and enhanced services) so that discrimination by a BOC (or its predecessor, AT&T) could be easily detected.[63] Subsequently, in *Computer III*, the Commission exercised its authority under sections 201 and 202 to require the BOCs and AT&T to provide competitors with (1) unbundled access to all basic network capabilities that would be useful in enhanced service applications, and (2) comparably efficient interconnection to the BOCs' local networks.[64] In imposing these requirements, the Commission sought

> to ensure that the BOCs or AT&T do not discriminate in favor of their own operations or their own customers . . . . Therefore, we require AT&T and the BOCs to file with us quarterly reports comparing the level of service they provide to their enhanced service affiliates with that they provide to their enhanced service competitors. These reports should include the timing of installation and maintenance of basic services and should address the quality and reliability parameters that we have described.[65]

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[62] *NPRM* at ¶ 1.

[63] *See Computer II Order* at ¶ 286 (citing, *inter alia*, sections 201 and 202 of the Act).

[64] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry),* Report and Order, CC Docket 85-229, 104 FCC 2d 958 at ¶ 354 (1986) (*Computer III Phase I Order*) (citing, *inter alia*, sections 201 and 202 of the Act), *on recon.*, 2 FCC Rcd 3035 (1987), *on further recon.*, 3 FCC Rcd 1135 (1988), *on second further recon.*, 4 FCC Rcd 5927 (1989), *vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990).

[65] *Computer III Phase I Order* at ¶ 192.

Similarly, in the *Special Access Expanded Interconnection Order*, the Commission imposed certain obligations on incumbent LECs so that CAPs could compete more effectively in the provision of special access.[66] Specifically, the FCC required incumbent LECs to offer channel terminations to interstate special access customers separately from channel mileage (*i.e.*, transport). This allowed CAPs to buy channel terminations and combine them with their own transport, thereby making it easier for them to compete with the incumbents.[67]

As these orders show, well before the 1996 Act the Commission sought to prevent anti-competitive behavior by incumbent LECs arising from their market power in services used as inputs by competitors. In each case, the Commission used its authority under sections 201 and 202 to ensure that incumbent LECs did not extend their dominance over key input services to impede competition for other services. Consistent with these prior precedents, the Commission should exercise its authority under sections 201(b) and 202(a) to impose performance standards and reporting requirements on the incumbent LECs' provisioning and maintenance of interstate special access services.

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[66] *In the Matter of Expanded Interconnection with Local Telephone Company Facilities Amendment of the Part 69 Allocation of General Support Facility Costs*, Report and Order and Notice of Proposed Rulemaking, CC Docket No. 91-141, 7 FCC Rcd 7369 at ¶ 1 (1992) (*Special Access Expanded Interconnection Order*), *vacated in part and remanded sub nom. Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

[67] Before the *Special Access Expanded Interconnection Order*, CAPs generally were "limited to providing end-to-end interstate special access connections, . . . completely bypassing LEC facilities." As a result, customers usually could not "combine their own or CAP facilities with portions of the LEC network to satisfy their special access needs." *Special Access Expanded Interconnection Order* at ¶ 4.

B. Application of Section 201(b)

Section 201(b) prohibits carriers from engaging in "unjust or unreasonable" practices.[68] The FCC has previously relied on section 201(b) to impose performance standards on incumbent LECs. For instance, the Commission recently relied on section 201(b) to require incumbent LECs to provision cross-connects between collocated competitive LECs "in a time frame no longer than that which the incumbent provides itself or any affiliate or subsidiary."[69] In making this finding, the Commission expressly compared the provisioning of cross-connects to that of special access services.[70] As with the provisioning of cross-connects, the Commission has ample authority under section 201(b) to establish national performance measurements, standards and reporting requirements for the incumbent LECs' provisioning and maintenance of interstate special access services. A key piece of evidence in determining whether a practice is unjust or unreasonable is the comparable practice the incumbent LEC follows with its own retail customers.

C. Application of Section 202(a)

Courts and the Commission have adopted a three-part test to determine whether a carrier has violated section 202(a)'s prohibition against "unjust or unreasonable discrimination": (1) are

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[68] 47 U.S.C. § 201(b) ("All charges, practices, classifications, and regulations for and in connection with [a] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful . . . ."). As the *NPRM* notes, "the Commission previously has applied the requirements of section 201 to special access services." *NPRM* at ¶ 8 (citing as an example *Investigation of Access and Divestiture Related Tariffs; MTS and WATS Market Structure*, CC Docket No. 83-1145, 98 F.C.C.2d 730 at ¶¶ 13, 14 (1984)).

[69] *See*, *e.g.*, *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order, CC Docket 98-147, 16 FCC Rcd 15435 at ¶ 76 (2001), *petitioned for review*, Case Nos. 01-1371, 01-1379. (*Collocation Remand Order*). The FCC also required the incumbents to provision such cross-connects using "the most efficient interconnection arrangements available."

[70] *Collocation Remand Order* at ¶ 73 (noting that "cross-connects are not functionally different from other nonswitched services, such as special access services, that incumbent LECs provide to other carriers and end users.").

the services at issue "like" one another; (2) if so, is there disparate pricing or treatment between the like services; and (3) if so, the provider of the service must prove that the discrimination is reasonable.[71] An incumbent LEC's provisioning special access services to its retail customers as rapidly as possible, while taking much longer to provision these same services to its wholesale customers constitutes unjust and unreasonable discrimination in violation of section 202(a).

Special access service is a single type of service, regardless of whether it is provided to the business customers of an incumbent LEC or to the business customers of competing carriers. "Because the service in question is a single type of service, it is by definition a 'like' service" under section 202(a).[72]

As explained above, incumbent LECs have both the incentive and the ability to provision special access services to their own retail customers in a manner that differs considerably from that afforded to wholesale customers. For instance, incumbent LECs may seek to establish a competitive advantage over rival carriers by provisioning special access faster for their own retail customers than they provision such services to rivals' customers. Likewise, incumbent LECs may provide their own customers shorter repair times. Such disparate treatment is clearly discriminatory given that retail and wholesale customers are similarly situated with respect to special access services.[73]

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71 47 U.S. C. § 202(a) (prohibiting common carriers from making "any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications service, directly or indirectly, by any means or device . . ."); *In the Matter of William G. Bowles Jr. P.E. d/b/a Mid Missouri Mobilfone v. United Telephone Co. of Missouri*, 12 FCC Rcd 9840 at ¶ 20 (1997) (*Bowles*) (applying three-part test and citing various precedents).

72 *Bowles* at ¶ 21 (citing *MCI v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1980)).

73 It is well established that a carrier is prohibited from discriminating among its customers based on whether the customers resell the services they have purchased from the carrier. *See, e.g.*, *Regulatory Policies Concerning Resale*, Report and Order, CC Docket No. 80-54, 83 FCC 2d 167, 171, 177 (1980); *People's Network v. AT&T*, 12 FCC Rcd 21081 at ¶ 31.

Once it has been established that the services at issue are "like" one another and have been subject to disparate treatment, the defending party has the burden of proving that the discriminatory treatment is "reasonable."[74] For example, as discussed earlier, the New York PSC has found that Verizon appears to discriminate between retail and wholesale customers. Incumbent LECs have provided no basis for concluding that any discriminatory treatment of their carrier customers is reasonable. In determining whether a practice is unreasonably discriminatory, it is essential to be able to compare the incumbent LECs' practices for their wholesale and retail customers.

D. There Is Ample Precedent for the Commission to Require Incumbent LECs to Submit Reports Containing Data on the Provisioning and Maintenance of Special Access to the Incumbents' Customers, Including End-User Customers

The Commission has often used reporting requirements to deter anti-competitive behavior that would violate section 201 and/or section 202 of the Act. Such reports are often required to contain data that allow competitive carriers to compare, in a timely fashion, the treatment they or their customers receive from a dominant carrier with the treatment afforded by that dominant carrier to itself, its affiliates, or its own customers.

For instance, the *Computer III Order* discussed above required AT&T and the BOCs to file quarterly nondiscrimination reports comparing the underlying basic services they provided to their own enhanced service affiliates with the basic services they made available to their competitors in the enhanced services market.[75] The FCC's *Foreign Participation Order* also "adopt[ed] an approach that in large part relies on reporting requirements" to prevent foreign

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[74] *E.g.*, *Bowles* at ¶ 20 (citing precedents); *National Communications Ass'n v. AT&T*, 238 F.3d 124, 130 (2d Cir. 2001).

[75] *See infra,* p. 27.

carriers from favoring their affiliates "at the expense of unaffiliated U.S. carriers."[76] Thus, the Commission's rules require dominant providers of international communications services to "[f]ile quarterly reports summarizing the provisioning and maintenance of all basic network facilities and services procured from its foreign carrier affiliate or from an allied foreign carrier . . . . These reports should contain . . . the average time intervals between order and delivery[.]"[77] The *Undersea Cable Order* also adopted a requirement, to be codified in section 1.767(l)(1) of the Commission's rules, that any submarine cable licensee affiliated with a carrier that has market power in a cable's destination market must file quarterly reports.[78] These precedents and rules make clear that the Commission may, in its discretion, require incumbent LECs to submit periodic reports on the incumbent LECs' provisioning and maintenance of interstate special access to all customers, including incumbent LEC retail customers.

E. Pricing Flexibility

The *NPRM* seeks comment on "how the deregulatory treatment of special access services in the *Pricing Flexibility Order* relates to the potential imposition of special access performance measures and standards."[79] As explained below, adopting performance requirements for incumbent LEC provisioning and maintenance of special access is completely consistent with the Commission's *Pricing Flexibility Order.* As the Commission has acknowledged, the *Pricing Flexibility Order* "did not go so far as to find that incumbents do not have market power" with

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76 *In the Matter of Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order, 12 FCC Rcd 23891, IB Docket No. 97-142 at ¶¶ 225, 226 (1997), Order on Recon., 15 FCC Rcd 18158 (2000) (citing § 201 in ordering clause, ¶ 387).

77 47 C.F.R. § 63.10(c)(4).

78 *See Review of Commission Consideration of Applications under the Cable Landing License Act*, Report and Order, IB Docket No. 00-106, ¶¶ 34-35 (rel. Dec. 14, 2001) (*Undersea Cable Order*); *id.* App. B, section 1.767(l)(1).

79 *NPRM* at ¶ 14.

respect to the provision of special access services.[80] Rather, the *Pricing Flexibility Order* merely establishes the circumstances under which incumbents will be granted a measure of pricing flexibility. In fact, in the *Pricing Flexibility Order,* the Commission expressly refused to deem incumbent LECs non-dominant in the provision of special access services[81] and retained tariffing and other requirements to restrain abuse of market power.[82]

Recent decisions support the conclusion that incumbent LECs retain considerable market power in the provision of special access services. For example, in November 1999, the Commission rejected incumbent LEC petitions for forbearance from dominant carrier regulation in the provision of special access and high capacity dedicated transport services in the urban markets with the largest amount of competitive entry.[83] More recently, the New York PSC characterized Verizon as the "dominant" provider of special access services for southern Manhattan – which is generally regarded as the most competitive market in the United States.[84]

The Commission's pricing flexibility policy does not obviate the need for special access performance standards to restrain incumbent LECs' incentives to discriminate with regard to the non-price characteristics of the provisioning of special access services, such as quality or

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[80] *See NPRM* at ¶ 14 (citing *Pricing Flexibility Order*, CC Docket No. 96-262, 14 FCC Rcd 14221 at 14225, ¶ 3 (1999).

[81] *Pricing Flexibility Order* at ¶ 151. *See also WorldCom Inc., v. FCC*, 238 F.3d 449 at 460 (D.C. Cir. 2001) ("the FCC did not engage in a thorough competition analysis" of the sort that would be expected in non-dominance proceedings).

[82] *See* FCC Brief, *WorldCom Inc., v. FCC* at 27 (July 2000). For example, under Phase I, "the incumbent LECs' ability to increase rates for those services is still constrained by price caps." *Id.* at 24.

[83] *See Petition of U S West Communications, Inc. et al*, Memorandum Opinion and Order, CC Docket No. 98-157, 14 FCC Rcd 19947 (1999) (*Dominance Order*) at ¶ 33 ("the evidence proffered by the BOC petitioners in support of their forbearance petitions is not sufficient to support a conclusion that they are no longer dominant in the provision of special access and high capacity dedicated transport services or that sufficient competition exists to preclude anti-competitive conduct in those markets").

[84] *See NY Special Services Order* at ¶ 6; *NY Special Services Rehearing Order* at 2. Indeed, the failure of the BOCs to lower rates in MSAs for which they have been granted Phase II pricing flexibility is a strong indication of continued dominance in the provision of special access.

timeliness of service.[85] In its *Pricing Flexibility Order,* the Commission recognized that, even after receiving pricing flexibility, an incumbent LEC may still exercise market power, particularly in those areas of the Metropolitan Statistical Area (MSA) that lack a competitive alternative.[86] Accordingly, the Commission retained the requirement that incumbent LECs file generally available tariffs for special access services, even where pricing flexibility has been granted.[87]

For these reasons, and using the same logic that compelled the Commission to retain its tariffing requirements in areas receiving pricing flexibility,[88] the Commission should require that any performance metrics adopted in this proceeding apply to the incumbent LECs' provision of special access services throughout their service areas. It is critical that tariffs and performance requirements establish a baseline of price and performance that is available to customers without competitive alternatives, including those customers in MSAs in which pricing flexibility has been granted.

Competitive LECs are dependent on incumbent LEC channel termination facilities even in those MSAs that meet the Commission's Phase II pricing flexibility trigger for end user

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[85] *See, e.g., Dominance Order* at ¶ 34 ("because the BOC petitioners have failed to show that competition will constrain anti-competitive conduct by them, the public interest is best served by continued regulation of special access and high capacity dedicated transport services which is designed to foster competition for these services").

[86] *Pricing Flexibility Order* at ¶ 151.

[87] These tariffing requirements do not prevent incumbent LECs from raising the price for special access, however. Verizon, for example, recently raised rates for special access services in areas where it has been granted pricing flexibility. *See, e.g.*, Verizon Tariff FCC No. 1, § 7.5.16 (revised effective January 5, 2002) (showing an increase in monthly rates for DS-1 special access services in price bands 5 and 6). Moreover, Verizon's prices for special access services in the price bands where it has been granted pricing flexibility are higher than its rates for the same services in the corresponding rate zones where it is still subject to price caps. *See id.* (offering monthly rates for special access ranging from $142.20 - $158.57 per DS-1 channel termination in rate zones where Verizon is still subject to price caps compared to rates ranging from $146.66 - $190.49 in the corresponding price bands where Verizon has been granted pricing flexibility).

[88] *Pricing Flexibility Order* at ¶ 153

channel terminations. Notably, the Commission made clear in the *Pricing Flexibility Order* that Phase II pricing flexibility was not tantamount to a finding that the incumbent LEC did not have market power.[89] Moreover, the Commission acknowledged that the *Pricing Flexibility Order*'s collocation-based test does not provide direct evidence of buildings served by competitive LECs; the Commission adopted the collocation-based test in spite of that "shortcoming" only because collocation was "the best option available" at the time.[90] It has been WorldCom's experience that there is, at most, a weak correlation between the number of collocations in an MSA and the percentage of buildings that can be reached using competitive LEC facilities. In particular, WorldCom analysis has found that, even in those wire centers where there is collocation, only about 13 percent of buildings can be reached using competitive LEC facilities.

F. Role of State Commissions

The *NPRM* seeks comment on the ongoing role of the states with respect to the provisioning of special access services.[91] The FCC clearly has jurisdiction over all interstate special access circuits, and is therefore in the best position to establish a comprehensive plan to address special access performance by incumbent LECs. In addition to addressing jurisdictional concerns, an FCC order would also ensure that there is a single nationwide rule governing special access provisioning and maintenance. This is particularly important, given that the national nature of the enterprise market means that an incumbent LEC's failure to meet its special access provisioning and maintenance obligations in one state can have dramatic adverse implications on a competitor's ability to do business in other states.[92] Thus, there is a strong need for the FCC to establish a single, nationwide plan addressing special access performance by

[89] *Id.* at ¶ 151.
[90] *Pricing Flexibility Order* at ¶ 103.
[91] *NPRM* at 11.

incumbent LECs. Without some action by the FCC, moreover, competitive carriers will have no recourse when state commissions find problems with the incumbent LECs' special access performance, but decide they lack jurisdiction to address the problems.[93]

WorldCom believes that while the FCC should retain primary jurisdiction over incumbent LECs' interstate special access services, the states should work in tandem with the FCC to continue the important work they have begun in this area. Specifically, the incumbent LECs should be required to report special access-related data pursuant to the measurements, standards and rules established in this proceeding to both the FCC and the states. The states would then be in a position to take that data and monitor incumbent LEC performance and take any steps, such as investigations, hearings, or other enforcement actions that may be appropriate. In turn, when the FCC conducts its own investigations or enforcement actions, it may consider findings from state proceedings. In this way, both the FCC and the state commissions can play a cooperative role in ensuring that incumbent LECs maintain acceptable levels of performance regarding the ordering, provisioning and maintenance of special access services and that competitors and end users are not injured by unreasonably poor or discriminatory performance by the incumbent LECs.

IV. THE COMMISSION SHOULD ADOPT THE JOINT COMPETITIVE INDUSTRY GROUP'S PROPOSED PERFORMANCE METRICS

A. Performance Metrics Are Essential to Preventing Incumbent LECs from Engaging in Impermissibly Unreasonable or Discriminatory Behavior

As explained above – and as the Commission has recognized – regular reporting on performance will provide a disincentive for the incumbents to engage in anticompetitive

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[92] *See* discussion above at section II.A.

[93] *See, e.g.*, Letter from Maureen O. Helmer, Chairman, New York PSC, to Michael K. Powell, Chairman, FCC (May 22, 2001).

activities with respect to special access services.[94] Without reporting requirements, measures and standards to deter them, incumbent LECs have strong incentives to provide superior service to their affiliates and their retail customers, and little incentive to improve performance to their competing carrier customers.

The current section 208 complaint process has proven less than effective as a means of policing incumbents' abuse of their power in the special access market, or of resolving special access provisioning and maintenance disputes. One problem is that while the burden of proof rests with the carrier complaining of discriminatory treatment, the complainant usually does not have access to the incumbent LEC data needed to prove its claim. Requiring incumbent LECs to report special access performance data will help remedy this problem by making the necessary information more readily available and by providing "a greater transparency of the incumbent LEC's special access provisioning processes."[95]

The adoption of metrics designed to detect anti-competitive practices will also reduce the burden on the Commission's enforcement staff. Effective reporting requirements based on a standard set of business rules[96] will provide the Commission with reliable data to use in evaluating the incumbent LECs' performance and practices and will avoid the need to reconcile "dueling data" from incumbent LECs and competitive carriers.[97] Incumbents' reports will also

[94] *NPRM* at ¶ 13.

[95] *Id.*

[96] Business rules are detailed specifications governing the way data are to be collected, measured and reported. *Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, CC Docket No. 01-318, 2001 FCC Lexis 6242 at ¶ 1, n.2 (2001).

[97] WorldCom itself has tried on multiple occasions to reconcile its data with the data of the incumbent LECs. Such reconciliation is extremely difficult without clearly-defined business rules, such as those that are included as part of the Joint Competitive Industry Group's proposed metrics.

enable competitive carriers to better assess their own treatment by the incumbent LECs and to pursue additional corrective actions.

B. Incumbent LECs Must Be Required to Report on Ordering, Provisioning, and Maintenance and Repair of Special Access Services for Competitors, Affiliates and Retail Customers

At a minimum, an effective set of performance measures and enforcement mechanisms must include incumbent LEC reporting on performance in the areas of ordering, provisioning, and maintenance and repair of special access services. The Joint Competitive Industry Group has proposed a carefully tailored, core set of metrics covering these critical areas. The proposed metrics are described in detail in the *Joint Competitive Industry Group Proposal* filed separately today.[98] A brief description of the metrics, and the specific purpose they serve, is provided below. The Joint Competitive Industry Group proposes that the incumbents should report on the following metrics each month.

1. Ordering

- **FOC Receipt:** Measures the interval between the time a carrier sends a clean ASR and the return of the FOC with a specific date on which the incumbent LEC commits to install the requested circuit(s). Competitive carriers need to receive FOCs quickly so that they can inform their own end-user customers when they can expect installation or other work to be completed. The Joint Competitive Industry Group expects the incumbents to be able to provide 98% of all FOCs within 2 business days after receiving a clean ASR for DS-0 and DS-1 circuits, and within 5 business days for DS-3 circuits. This would address the frustration that customers experience when they must wait an extended period of time just to find out when the installation will occur.

- **FOC Receipt Past Due:** Measures all ASR requests for which the incumbent has not provided a FOC within the expected FOC receipt interval (*e.g.*, 2 business days for DS-0 or DS-1 circuits) at the end of the month. This metric allows competitive carriers to gauge the magnitude of late FOCs and is essential to ensuring that FOCs are received in a timely manner. The Joint Competitive Industry Group expects that fewer than 2% of all ASRs will remain "open" (*i.e.*, without a FOC from the incumbent) at the end of any given month. When ASRs remain open for a long period of time, carriers are unreasonably prevented from

[98] *See* Letter from Joint Competitive Industry Group to Michael Powell, Chairman, FCC (Jan. 22, 2002) (*Joint Competitive Industry Group Proposal*).

providing their customers with installation dates. A carrier's relationship with its customer is harmed any time it is forced to make the customer wait weeks simply to get an installation date.

- **Offered versus Requested Due Date:** Measures the percentage of time the due date the incumbent commits to in the FOC is equal to the due date requested in the carrier's ASR, when the carrier requests a due date that is equal to or greater than the stated interval offered by the incumbent LEC. This metric provides a sense of how often the incumbent LEC commits to install service on the date requested. Given that this metric only measures requests that fall within the incumbents' own stated intervals, the Joint Competitive Industry Group expects that the incumbent will commit to the requested due date 100% of the time.

2. Provisioning

- **On-Time Performance to FOC Due Date:** Measures how frequently the incumbent LEC completes the requested installation on or before the FOC due date, taking into consideration customer not ready (CNR) situations, where the incumbent could not meet its commitment due to verifiable situations beyond its control. The Joint Competitive Industry Group expects incumbents to meet installation date promised in the FOC 98% of the time (taking into consideration verifiable CNR situations).

- **Days Late:** Measures the average days late for those orders that are not completed by the FOC due date when there are no verifiable CNR situations. This metric provides insight into the magnitude of the incumbent LECs' failures to meet their committed due dates. The Joint Competitive Industry Group expects that, on average, an incumbent will not miss its FOC due dates by more than three days. Obviously, it is problematic any time an incumbent LEC misses an installation due date. However, the longer the incumbents lag behind their committed installation dates, the more strain they place on carriers' relations with their customers.

- **Average Intervals—Requested/Offered/Installation:** Measures the interval between the date a carrier sends its final ASR for a particular order and: 1) the installation date requested by the carrier; 2) the installation date committed to by the incumbent in the FOC; and 3) the date the circuit is actually provisioned by the incumbent. While this metric is meant as a diagnostic tool, WorldCom would expect all three intervals to be equal (*i.e.*, the incumbent should offer to install, and actually install, an order on the date requested by the carrier).[99]

- **Past Due Circuits:** Measures the number of outstanding circuits for which the incumbent has failed to meet its FOC due date at the end of the month. This metric provides a snapshot of the number of circuits that are past due at the end of each month (*i.e.*, the number of

[99] The Joint Competitive Industry Group establishes a definition of the offered installation interval. The offered interval may not be longer than the least of: (1) the standard interval (DS-0 and DS-1: 7 business days; DS-3: 14 business days); (2) the interval published by the incumbent LEC; or (3) the interval actually provided to the incumbent's affiliates or retail customers in that state. *See Joint Competitive Industry Group Proposal* at Attachment B.

"backlogged" circuits). The Joint Competitive Industry Group expects that fewer than 3% of all backlogged circuits will be more than 5 days past the FOC due date.

- **New Installation Trouble Report:** Measures the rate of trouble reports submitted within 30 calendar days of the installation of a new circuit. This metric provides an indication of the quality of the work performed by the incumbent during installation. Carriers and their customers expect new circuits to work properly. The Joint Competitive Industry Group therefore proposes that incumbents be held to a standard of no more than one trouble report per 100 circuits installed (*i.e.*, a 1% new installation trouble report rate).

3. Maintenance and repair

- **Failure Rate:** Measures the percentage of in-service circuits for which trouble tickets have been resolved during the reporting period. This metric captures the overall quality of the circuits provided by the incumbents. The Joint Competitive Industry Group expects that the incumbents will have an annualized failure rate of no more than 10% (*i.e.*, no more than 10% of all incumbent-provided circuits will fail within any given year).

- **Mean Time to Restore:** Measures how long it takes the incumbent to restore circuits to normal operating levels once a carrier submits a trouble report to the incumbent. Given that a customers' service is likely to be interrupted until the incumbent can resolve the trouble report, the mean time to restore must be very short. The Joint Competitive Industry Group expects that the incumbents will take no more than two hours to restore circuits with capacity of less than DS-3, and no more than one hour to restore circuits with a capacity of DS-3 and above.

- **Repeat Trouble Report Rate:** Measures the percentage of maintenance troubles resolved during the reporting period that had at least one prior trouble ticket within thirty (30) days of the creation of the current trouble report. A high repeat trouble report rate indicates either poor provisioning quality by the incumbent or poor repair work. Repeat troubles mean that carriers' customers are being disrupted repeatedly as the same circuit(s) continue to go out of service or perform inadequately. The Joint Competitive Industry Group expects to experience a repeat trouble report rate of no more than 3% for all DS-3 and higher capacity special access circuits, and no more than 6% for all other circuits.

For performance reports to be effective, data on incumbent LEC provisioning must be sufficiently disaggregated to enable regulators and competitors to detect discriminatory behavior. Specifically, incumbent LECs must be required to disaggregate their reporting data by class of customers (*i.e.*, unaffiliated IXCs; competitive LECs; unaffiliated information service providers (ISPs); retail business customers; affiliated ISPs and affiliates offering interLATA services pursuant to sections 271 and 272); by state; and by circuit type (*i.e.*, DS-0, DS-1, DS-3, OCn).[100] Currently, there is little data available regarding the incumbent LEC's internal processes.[101] This information is critical, however, if competitors and regulators are to be able to detect unreasonably discriminatory behavior by the incumbent LECs. Accordingly, incumbent LECs must report on their performance for their retail customers, applying either the metrics developed by the Joint Competitive Industry Group or an analogue that effectively captures their performance for their retail customers in a manner that enables the Commission and competitors to detect discrimination.

In order to protect confidential, carrier-specific data, the process for reporting performance data will necessarily entail two steps. First, the incumbent LEC will provide a monthly performance report to the Commission. That report will include aggregate performance data by customer class and circuit type and will be publicly available. At the same time, the incumbent LEC will provide each purchaser of special access an individualized monthly report containing data on the incumbent LEC's performance for that specific carrier. These individual carrier reports will also be provided to the Commission, on a confidential basis, so that the Commission may determine whether discriminatory treatment exists among carriers.

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[100] This is critical because aggregating performance data for all circuits may mask poor performance on the more significant, higher capacity circuits. Poor performance on a DS-3 or DS-1 circuit is likely to create more economic harm than poor performance on a lower capacity DS-0 circuit. Therefore, it is important to know not only how many circuits are subject to poor performance, but also the capacity of the problem circuits.

[101] Indeed, as noted in the *NPRM*, performance reporting requirements would fulfill the important goal of filling in the gap in everyone's knowledge about how the incumbent LEC's internal processes operate. *See NPRM* at ¶ 13 (finding that "[w]ith respect to benefits, the adoption of performance metrics would provide greater transparency of the incumbent LECs' special access provisioning processes.").

C. The Joint Competitive Industry Group's Proposal Will Not Impose Any Significant New Burdens on Incumbent LECs and May Ultimately Replace ARMIS Reporting Requirements

The performance measurement program proposed by the Joint Competitive Industry Group would not impose significant implementation or reporting costs on incumbent LECs. As an initial matter, the reporting program proposed by the Joint Competitive Industry Group may allow the Commission to eliminate the special access reports contained in Table I of the ARMIS 43-05 reports. Current ARMIS reporting requirements for special access circuits are of little use in gauging unreasonable or discriminatory conduct. First, the reported data is not disaggregated by carrier or by type of circuit.[102] As explained above, without carrier-specific information by circuit type, there is no way to determine whether an incumbent LEC is providing unreasonable service to competitive carriers. Second, ARMIS does not require the incumbent LEC to report on service to its affiliate(s) or retail customers. Thus, ARMIS does not reveal discriminatory treatment. Third, with two exceptions, ARMIS is reported on an annual basis.[103] Such a lengthy time frame makes it impossible for a carrier to demonstrate unreasonable or discriminatory behavior until long after any effective remedy can be imposed. Fourth, ARMIS is not audited. Finally, ARMIS is reported only on service to interexchange carriers. No ARMIS data is available for ISPs or competitive LECs.

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[102] Two ARMIS measurements (Total Trouble Reports and Average Interval) are reported for both "special access" and for "high speed special access," which includes DS-1, DS-3, "and other similar digital services." See FCC Report 43-05 Instructions at 8 (*available at* http://www.fcc.gov/ccb/armis/instructions/4305instructions.htm#T1R) (last visited January 18, 2002). This level of disaggregation is insufficient. *See supra*, note 100.

[103] SBC and Verizon are required to report ARMIS on a quarterly basis as a condition of their merger approvals. *See Application of Ameritech Corp. and SBC Communications Inc. for Consent to Transfer Control*, CC Docket No. 98-141, 14 FCC Rcd 14712, Appendix C, at ¶ 63 (1999); *Application of GTE Corp and Bell Atlantic Corp. for Consent to Transfer Control*, CC Docket No. 98-184, 15 FCC Rcd 14032, Appendix D, at ¶ 52 (2000).

ARMIS also suffers from weak business rules that leave the incumbent LECs a great deal of latitude in determining how they measure their performance. For example, the ARMIS metric for Total Trouble Reports ostensibly discloses the total number of trouble reports received by the incumbent LEC during the year. It is up to each LEC, however, to determine what constitutes a trouble report that must be included in the metric. Thus, ARMIS can provide a misleading picture of an individual LEC's performance because, as the National Association of Regulatory Utility Commissioners (NARUC) has explained: "[o]ne carrier may have a list of twenty or more reasons for excluding a trouble ticket from the report, while another utility may have only two or three acceptable exceptions."[104] The extreme variations in the ways in which incumbent LECs may interpret the ARMIS metrics renders ARMIS reports all but meaningless and cripples competitive carriers' ability to compare the service quality offered by the various incumbent LECs. Therefore, replacing Table I of the ARMIS 43-05 reports with the reports proposed by the Joint Competitive Industry Group would significantly improve visibility with respect to provisioning and maintenance without increasing the regulatory burdens on the incumbent LECs. The Commission may also find that the improved reporting scheme based on the Joint Competitive Industry Group's metrics fulfills the BOCs' performance measurement obligations implementing section 272 of the Act, thereby eliminating the need for a separate section 272 reporting requirement.

Implementation costs would be minimal. Not only does the Joint Competitive Industry Group's proposal use a limited number of metrics, but most of those metrics are identical to or similar to the ones already mandated by existing regulatory requirements (such as ARMIS or

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[104] *See 2000 Biennial Regulatory Review – Telecommunications Service Quality Reporting Requirements*, Notice of Proposed Rulemaking, CC Docket No. 00-229, 15 FCC Rcd 22113, Appendix C, at 26 (2000); *see also* Reply Comments of Time Warner Telecom, CC Docket No. 00-229 at 6-9 (Feb. 16, 2001).

state reporting requirements), or that the incumbent LECs already report voluntarily to carrier customers.[105] Moreover, it seems fundamental to a company's business to know how long it takes to install and repair special access circuits – not only for wholesale customers, but also for retail customers. As a result, the incumbent LECs would have to make only modest modifications to their systems and procedures in order to implement the reporting program proposed by the Joint Competitive Industry Group.

D. The Commission Should Not Adopt an Automatic Sunset Provision for the Incumbents' Performance Metrics and Reporting Requirements

In the *NPRM*, the Commission seeks comment on whether it should establish a sunset date for the reporting requirements.[106] WorldCom views a sunset provision as unnecessary and counterproductive. The *NPRM* contemplates that "at such time as the services discussed herein are routinely provisioned in a nondiscriminatory and just and reasonable manner, the Commission will suspend any reporting requirements that have become unnecessary."[107] However, since it is the reporting requirements themselves that will enhance the likelihood that special access provisioning and maintenance will be conducted in a "nondiscriminatory and just and reasonable manner," suspending such requirements would likely lead to the incumbents resuming their poor and/or discriminatory performance. The Commission should therefore exercise great caution in suspending the reporting requirements once they have been imposed. If the FCC suspends the reporting requirements prematurely and the incumbent LECs resume their anti-competitive behavior, the Commission may have difficulty remedying the situation before the incumbents cause irreparable harm to competing carrier customers and end-user customers.

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[105] *See, e.g.,* Letter from W.W. Jordan, BellSouth, to Magalie Roman Salas, FCC (August 22, 2001) (describing the "standard provisioning and maintenance reports that BellSouth offers to its special access customers").

[106] *NPRM* at ¶ 20.

[107] *NPRM* at ¶ 19.

For similar reasons, the Commission should not adopt a sunset date on which the proposed reporting requirements would automatically end.[108] Automatic sunset dates would reduce incumbent LECs' incentives to comply with their statutory obligations.[109] In fact, an automatic sunset date would provide incumbent LECs with an incentive to strategically delay their implementation of, and compliance with, Commission orders until the sunset date arrives. In addition, if an automatic sunset date is adopted, there will be nothing to prevent incumbent LECs from backsliding in the provisioning and maintenance of special access services once the sunset date has passed.

Rather than rely on an automatic sunset date, the Commission should require each incumbent LEC to demonstrate it should no longer be subject to performance standards and reporting obligations. The decision to end performance regulation for a particular LEC should be based on a finding that either: (1) the incumbent is no longer dominant in the provision of wholesale special access; or (2) that the conditions for regulatory forbearance under the Act have been met.[110] The incumbent LEC should have to meet a high standard of proof in demonstrating

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[108] *NPRM* at ¶ 20.

[109] For instance, in 1998, WorldCom filed two complaints to enforce the Bell Atlantic/NYNEX merger conditions, which were set to sunset on Aug. 14, 2001. *See, e.g., MCI Telecommunications Corp. and MCImetro Access Transmissions Services, Inc*., File No. E-98-12 (Aug. 18, 2000) (*TELRIC Complaint*) and *MCI Telecommunications Corp. and MCImetro Access Transmissions Services, Inc*., File No. 98-32 (December 3, 2001) (*Performance Standards Complaint*). The TELRIC complaint was not decided until Aug. 18, 2000 – three years into the four year period of the conditions – and the performance standards complaint was not decided until Dec. 3, 2001, six months after the expiration of the merger conditions. There was absolutely nothing to ensure, or even encourage, the merged entity's compliance with the conditions while the section 208 complaints to enforce the conditions were pending, and no other enforcement action was being taken.

[110] When considering whether to grant forbearance from a particular section of the Act, the Commission must determine that: (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance

that it should no longer be subject to the Commission's special access reporting standards and remedies.

V. THE COMMISSION SHOULD ADOPT AN ENFORCEMENT PLAN

Exposing incumbent LEC behavior to the light of day through reporting likely will discourage anti-competitive behavior (poor performance and unreasonable discrimination), and will enable the Commission to leverage its enforcement resources. Nonetheless, the FCC must also adopt an enforcement plan that provides carriers with certainty regarding remedies for poor performance and unreasonable discrimination. An effective enforcement plan must induce performance that satisfies both objective standards and parity benchmarks.[111] Violations must be punished by penalties that are sufficient to deter anti-competitive behavior, and do not merely constitute a cost of doing business. The plan must also allow for audits by competitive carriers and independent auditors to ensure that the reports provided by the incumbent LECs are accurate. As detailed below, the remedy plan proposed by WorldCom satisfies each of these criteria. For the remedy plan to be effective, however, the Commission must also adopt expedited complaint procedures and devote adequate resources to investigating, monitoring, and enforcing incumbent LEC special access performance.

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from applying such provision or regulation is consistent with the public interest. 47 U.S.C. § 160(a).

[111] As used herein, the term "standard" describes a level of performance that is deemed acceptable. Failure to meet a performance standard is indicative of an unjust and unreasonable practice in violation of section 201(b). The term "benchmark" describes the level of service that the incumbent LEC provides to its affiliates(s) or retail customers and is used to measure whether the incumbent LEC is providing its competitors service at parity. Failure to meet a benchmark is indicative of unjust or unreasonable discrimination in violation of section 202(a).

A. WorldCom's Remedy Plan

To be effective, a remedy plan must swiftly punish anti-competitive behavior and enable customers to seek restitution and other remedies through the Commission and/or the courts.[112] WorldCom's proposed remedy plan, which includes both forfeitures (fines paid to the U.S. Treasury) and damages (payments to carriers) accomplishes these objectives. WorldCom's plan provides for higher levels of damages and forfeitures for the most critical metrics. The plan also takes into account the magnitude of the violation and the duration of the problem. Finally, the plan provides for audits as well as non-monetary penalties for systematic abuses.

1. Forfeitures

As noted, Tier 1 incumbent LECs should be required to provide aggregate and carrier-customer-specific monthly performance reports. In the monthly aggregate report, incumbent LECs would indicate, for example with flags, whether any performance standards or parity benchmarks had been missed for any class of customer (*e.g.*, provisioning for unaffiliated IXCs is slower than for retail customers). One or more missed metrics would trigger an expedited process for an FCC finding of liability and a requirement that the incumbent LEC pay a fine to the U.S. Treasury. As a first step in this expedited process, the Commission would automatically issue a notice of apparent liability (NAL) and an order to show cause. The NAL would identify each missed standard and each instance of discriminatory treatment both by class of customers and by circuit type. The NAL would also propose a specific penalty for each flagged miss. An individual carrier customer also would have the option of asking the Commission to issue an NAL and order to show cause if the incumbent LEC's customer-specific report revealed a

[112] WorldCom's remedy plan would apply only to Tier 1 incumbent LECs.

carrier-customer-specific violation of the performance standard or the parity benchmark, or if the carrier customer sought to challenge the accuracy of the incumbent LEC-provided data.

The order to show cause would direct the incumbent LEC to demonstrate why: (a) the Commission should not find that the incumbent LEC has violated the Commission's rules and the statute; and (b) the incumbent LEC should not be required to come into compliance with the Commission's performance requirements within 30 days. The order would provide the incumbent LEC with 15 days to respond to the NAL, and would allow carrier customers 7 days to reply to the incumbent LEC's response. The order would also state that the incumbent LEC bears the burden of demonstrating that its poor or unreasonably discriminatory performance was justified. This burden would be extraordinarily heavy. That is, absent a catastrophic event, the Commission would find that the incumbent LEC has violated the Commission's rules and the statute.

Within 30 days of the incumbent LEC's response to the NAL, assuming that the LEC has not been able to overcome the presumption of liability, the Commission would issue an order stating that the incumbent LEC has violated the Commission's rules and the Communications Act of 1934, and that it must pay the prescribed forfeiture to the U.S. Treasury. As the Commission has recognized,[113] any penalties associated with special access performance metrics must be substantial enough to serve as an effective deterrent, and not be regarded by the incumbent LEC as merely a "cost of doing business."[114] The forfeiture must therefore exceed the benefit the incumbent LEC reasonably could have expected to receive as a result of its poor

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[113] *NPRM* at ¶ 12.

[114] *In the Matter of the Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of The Rules to Incorporate the Forfeiture Guidelines*, Report and Order, CI Docket No. 95-6, 12 FCC Rcd 17087 at ¶ 24 (July 28, 1997) (recognizing that penalties must "take into account the subject violator's ability to pay" and be large enough to "guarantee that forfeitures issued

performance or discriminatory behavior.[115] In addition, the amount of the prescribed forfeiture should be adjusted to reflect: (1) the importance of the metrics involved; (2) the magnitude of the violation; and (3) the duration of the poor performance or discrimination.

First, the forfeiture amount should be highest for the most critical metrics. Although all of the proposed performance measurements are important, four metrics (On Time Performance, Past Due Circuits, Mean Time to Restore, and FOC Receipt Past Due) measure conduct that most critically affects competition and thus should carry higher forfeiture amounts. Second, the forfeiture amount should escalate with the magnitude of the missed performance, (*i.e.*, based on how far the incumbent LEC's actual performance falls short of the metric standard or the parity benchmark). Absent increased penalties based on magnitude, the incumbent LEC will have little incentive (indeed, it may have a disincentive) to meet its committed due dates once it determines that it is likely to miss a standard or benchmark. Third, forfeiture amounts should reflect the duration of the incumbent LEC's poor performance or discrimination. Thus, consecutive periods of missed metrics would result in progressively higher penalties.

2. <u>Damages (carrier-specific payments)</u>

Performance standards or parity benchmarks that an incumbent LEC missed for services provided to an individual carrier would be flagged in the carrier-customer-specific reports. In addition to paying potential forfeitures, an incumbent LEC should also be required to pay

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against large or highly profitable entities are not considered merely an affordable cost of doing business.).

[115] Congress has long recognized that penalties levied on "highly profitable communications entities" (*e.g.*, incumbent LEC monopolies) must be substantial enough to be an "effective deterrent" of violations of the Act and the Commission's rules. *See* S. Rep. No. 580, 95th Cong. 1st Sess. 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 109, 111. S*ee also* H.R. Conf. Rep. 386, 135 Cong. Rec. H. 9333, 9454 (1989). In the past twelve months alone, SBC paid over $50 million to the U.S. Treasury for violations associated with the Ameritech merger conditions. *See SBC, Verizon Pay Millions in Fines,* National Journal's Technology Daily, January 2, 2002. This provides clear evidence of a BOC's willingness to buy its way out of local competition obligations to the detriment of competitors.

damages directly to individual carriers injured by poor performance or discrimination. Under WorldCom's proposed plan, a carrier customer would be able to seek damages at the FCC or in court for any harm it suffered from the incumbent LEC's poor performance or discrimination. In addition, a carrier customer would have the option of pursuing other private remedies.

For major violations, the measure of damages would be three times lost revenues. The carrier could also seek injunctive relief and damages if it lost the end-user customer to the incumbent LEC. In that case, the Commission would direct the incumbent LEC to permit the end-user customer to void its contract with the incumbent LEC (or to discontinue service if ordered under a tariff) without penalty so it could receive service from the competitive carrier. If the end user chose to return to the competitive carrier, the incumbent LEC would also be ordered to pay the competitive carrier the costs of installation for the end-user customer and the competitive carrier would not charge the end-user customer for installation.

Complaints by individual carriers should be subject to a new expedited process. In the liability phase, a carrier would file a form complaint with the FCC specifying the incumbent LEC at issue; the month during which the violation occurred; the performance standard or parity benchmark that was missed; and the number of circuits involved. This complaint would be served simultaneously on the incumbent LEC and the Commission. The incumbent LEC would then have 10 days to answer. Identification of a missed performance standard or benchmark would create a rebuttable presumption that a violation of the Commission's rules had occurred and the incumbent LEC would bear the burden of submitting evidence sufficient to overcome that presumption in order to avoid a finding of liability.[116] The Commission would have 30 days from the date the complaint is filed to issue an order resolving the liability issue. Once the incumbent LEC's liability has been established, the carrier customer would file a statement of lost revenues, based either on its own calculations or as defined by a proxy schedule developed by the Commission. The damages phase would also be conducted on an expedited basis, and the Commission would award damages equal to three times the lost revenues.

For violations that are not deemed to be major violations, the competitive carrier would retain its right under the statute to seek normal damages either at the Commission or in federal court. The carrier would also have the right to pursue any other private remedy.

3. Audits

Competitive carrier audits and independent audits are also necessary to ensure the on-going accuracy of performance reporting and to dissuade incumbent LECs from abusing the regulatory process. The necessity of audits, especially as they impact performance reporting requirements, was made all too clear in a recent SBC merger conditions compliance audit, which found that errors in SBC's report on its compliance with the Carrier-to-Carrier Performance Plan may have had an impact on the company's calculation of the penalty payments made to the U.S. Treasury.[117]

To preserve the integrity of the performance reporting, each carrier customer must be allowed to conduct one audit per calendar quarter. The requesting carrier would pay for the audit unless the audit reveals inaccuracies in the incumbent LEC's report. In addition, each incumbent LEC should be required to undergo an annual independent audit of its performance reporting.

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[116] The carrier would have the option, but not be required, to reply to the incumbent LEC's answer. To avoid delay, such a reply would have to be filed within 5 days of the incumbent LEC's response.

[117] *See Application of Ameritech Corp. and SBC Communications Inc. for Consent to Transfer Control*, CC Docket No. 98-141, Ernst & Young, Report of Independent Accountants at 4 (attached to Letter from Sandra L. Wagner, Vice President, Federal Regulatory, SBC, to Magalie Salas, FCC (Sept. 4, 2001).

The independent audit would be conducted either by the Commission, or by an auditor selected by the Commission. The costs of the independent audit would be paid by the incumbent LEC.

4. Additional non-monetary penalties

The Commission should also announce that it will impose additional non-monetary penalties for systematic abuses of the performance metrics. These penalties should encompass the full panoply of enforcement mechanisms available to the Commission under the Act,[118] including any or all of the following actions: institution of an investigation, suspension of 271 authority, suspension of pricing flexibility, license revocation, or a prohibition on receiving government contracts.

Investigation. Evidence of systematic abuses can take many forms. At a minimum, the Commission should undertake an investigation for repeat or multiple offenses, and determine whether there is a pattern or practice of poor performance or discriminatory behavior.

Suspend 271 Authority. If a BOC that has been granted section 271 authority is found to have discriminated against a competitor in violation of section 272(e)(1), the BOC's 271 authority should be suspended until such time that it demonstrates that it is no longer engaging in such discrimination.[119] Section 271provides that if the Commission determines that a BOC has ceased to meet any of the conditions required for approval of in-region interLATA authority – including compliance with the requirements of section 272 – the Commission may suspend that BOC's 271 authority.[120] The Joint Competitive Industry Group's parity benchmarks are designed to detect the very type of discriminatory behavior that is prohibited in section

[118] *NPRM* at ¶ 12.

[119] Section 272(e)(1) requires that a BOC and its affiliates "shall fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates." 47 U.S.C. § 272(e)(1).

272(e)(1). It would therefore be consistent with section 272 to suspend a BOC's section 271 authority if the reports required under the Joint Competitive Industry Group's proposal reveal that the BOC is engaging in discriminatory treatment of unaffiliated carriers.

Suspend Pricing Flexibility. The Commission should also consider suspending any pricing flexibility it has granted to an incumbent LEC that fails to meet the standards or benchmarks for the provisioning and maintenance of special access services. The Commission authorizes incumbent LECs to have additional pricing flexibility based on evidence that the downstream (retail) special access market in a particular MSA is sufficiently competitive. Poor provisioning and maintenance performance in the upstream market (wholesale special access), is inextricably related to what happens in the downstream, retail market, however. As discussed above, incumbent LECs can gain tremendous advantage in the downstream market (*e.g.*, enterprise business market) by discriminating against competitors in the wholesale special access market. Thus, if an incumbent LEC fails to meet the prescribed performance standards or benchmarks, the Commission should consider this as evidence that the retail market is not sufficiently competitive to warrant pricing flexibility. In the face of such evidence, it is entirely appropriate for the Commission to suspend the authority for pricing flexibility for a specific MSA. Such a suspension should only be lifted in the event that the incumbent LEC demonstrates that it has met the special access standards and benchmarks for some period of time (for example, three consecutive quarters).

Revoke or Decline to Renew Licenses. The Commission should also consider any failure by the incumbent LECs to meet the standards or benchmarks for special access performance when determining whether an incumbent LEC has the requisite character to hold a Title III

[120] 47 U.S.C. § 271(d)(6)(A)(iii). Compliance with the requirements of Section 272 is one of the conditions for authorizing in-region interLATA services. 47 U.S.C. § 271(d)(3)(B).

license or Section 214 authorization. Patterns of noncompliance are relevant to determining whether a party has the right and character to hold such licenses. Indeed, an incumbent LEC's inability to follow the performance measurements, standards and benchmarks adopted by the Commission calls into question that incumbent LEC's ability to follow Commission regulations or orders. For this reason, an incumbent LEC should not be rewarded with a grant of licenses by this Commission while demonstrating an unwillingness to follow other Commission directives. The Commission has in the past revoked Title III and Section 214 operating authority for a carrier's violation of the Act or the Commission's rules.[121]

Prohibit Government Contracts. Any incumbent LEC that is in violation of the special access performance standards or benchmarks should also be prohibited from entering into government contracts. Various federal regulations prohibit companies that have violated labor, tax, or other federal laws from entering into government contracts.[122] Certainly, if the Commission makes a finding that an incumbent LEC has engaged in repeated violations of the

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[121] *See In The Matter Of CCN, Inc., Church Discount Group, Inc., Discount Calling Card, Inc., Donation Long Distance, Inc., Long Distance Services, Inc., Monthly Discounts, Inc., Monthly Phone Services, Inc., and Phone Calls, Inc*., Order to Show Cause and Notice of Opportunity for Hearing, CC Docket No. 97-144 (rel. April 21, 1998) (revoking a carrier's section 214 operating authority for slamming and other violations of the Act and Commission rules); *See also In re Revocation of the Licenses of PASS WORD, Inc. Licensee of Stations KMM697, KOA271 KRS678 and KUC918 in the Domestic Public Land Mobile Radio Service and Rodney J. Bacon d/b/a COEUR D'ALENE ANSWERING SERVICE Licensee of Stations KWU337 and KUO646 in the Domestic Public Land Mobile Radio Service and In re Applications of COURTESY COMMUNICATIONS, INC. Spokane, Washington PASS WORD, INC. Spokane, Washington Rodney J. Bacon d/b/a COEUR D'ALENE ANSWERING SERVICE Kellogg, Idaho, Rodney J. Bacon d/b/a COEUR D'ALENE ANSWERING SERVICE Coeur d'Alene Idaho, for Construction Permits in the Domestic Public Land Mobile Radio Service,* Order On Reconsideration (rel. May 29, 1981).

[122] An incumbent LEC that fails to meet the special access provisioning standards or benchmarks could be found ineligible from entering into other government contracts pursuant to the debarment, suspension and ineligibility sections found at 48 C.F.R. §§ 9.406-2(b)(1)(i) (B). The FCC could also mandate that any violations of the special access standards or benchmarks become part of the offending incumbent LEC's past performance information that is kept pursuant to the contractor performance information regulations found at 48 C.F.R. § 42.15.

Communications Act by failing to satisfy FCC established performance standards or benchmarks, that incumbent LEC should be ineligible for government contracts.

B. The Commission Must Devote Adequate Resources to Enforcing Special Access Performance Reporting Requirements

Once it has established an enforcement regime, the Commission must make it clear that it is prepared to devote adequate resources to the task, and to respond swiftly and surely to anti-competitive behavior by incumbent LECs. One option is for the Commission to model an enforcement strategy on its successful efforts to prevent backsliding after Bell Atlantic-New York had been granted interLATA authority.[123]

Immediately after Bell Atlantic-New York's section 271 application was granted, the Commission issued a public notice creating a special enforcement team to handle post-271 entry violations and adopting a process for resolving any future backsliding issues.[124] Upon learning that Bell Atlantic-New York was engaging in anti-competitive behavior, the FCC immediately took steps to remedy the situation. It collected evidence from various sources suggesting that Bell Atlantic-New York was mishandling orders,[125] and then established a process for investigating the concerns.[126] Once the Commission had completed its investigation, it took swift enforcement action to resolve the disputes over Bell Atlantic's performance.[127] The ensuing consent decree was unequivocal. It required three new performance measurements,

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[123] *See In the Matter of Bell Atlantic-New York Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, File No. EB-00-IH-0085, (rel. Mar. 9, 2000) (*Bell Atlantic-New York Backsliding Order*).

[124] *See* Public Notice, *Enforcement Team Created to Guard Against "Backsliding" on Competition Requirements*," DA 00-27 (rel. Jan. 10, 2000).

[125] *See* Letter from David H. Solomon, Chief, Enforcement Bureau, to Edward D. Young III, Senior Vice President, Regulatory, Bell Atlantic (February 7, 2000).

[126] *Id*. In this letter, the Commission gave Bell Atlantic-New York one week to answer a variety of interrogatories and to provide requested documents as part of the Commission's investigation.

[127] *Id*.

imposed payments to the U.S. Treasury, and included an express statement that if Bell Atlantic failed to correct the problems for a sufficient period of time or showed further deterioration in performance, the Commission could issue an order requiring Bell Atlantic to show cause as to why the Commission should not suspend or revoke Bell Atlantic's authority to provide long distance service.[128] These steps led to a rapid and effective resolution of the problems in New York.

The FCC's success in resolving the backsliding problems in New York was based on three critical factors: (1) it established a process to ensure that the backsliding issues were resolved; (2) it acted swiftly to investigate the service problems; and (3) it proposed stiff penalties – both monetary and non-monetary – if Bell Atlantic-New York reverted to its prior poor performance or otherwise failed to remedy the order processing problems. A process that mirrors these critical enforcement principles, such as those proposed by WorldCom, should be adopted here. Given the potential for adverse marketplace implications, the Commission should establish and implement processes for special access that will deter performance violations just as vigorously as it sought to deter section 271 backsliding.

[128] *Bell Atlantic-New York Backsliding Order* at 2.

VI. CONCLUSION

For the reasons set forth above, the Commission should adopt the Joint Competitive Industry Group's proposed ILEC Performance Measurements and Standards in the Ordering, Provisioning, and Maintenance and Repair of Special Access Service and Offered Installation Intervals for interstate special access services provided by Tier 1/Class A incumbent LECs. In addition, the Commission should enforce the performance metrics by adopting the remedy plan proposed by WorldCom.

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